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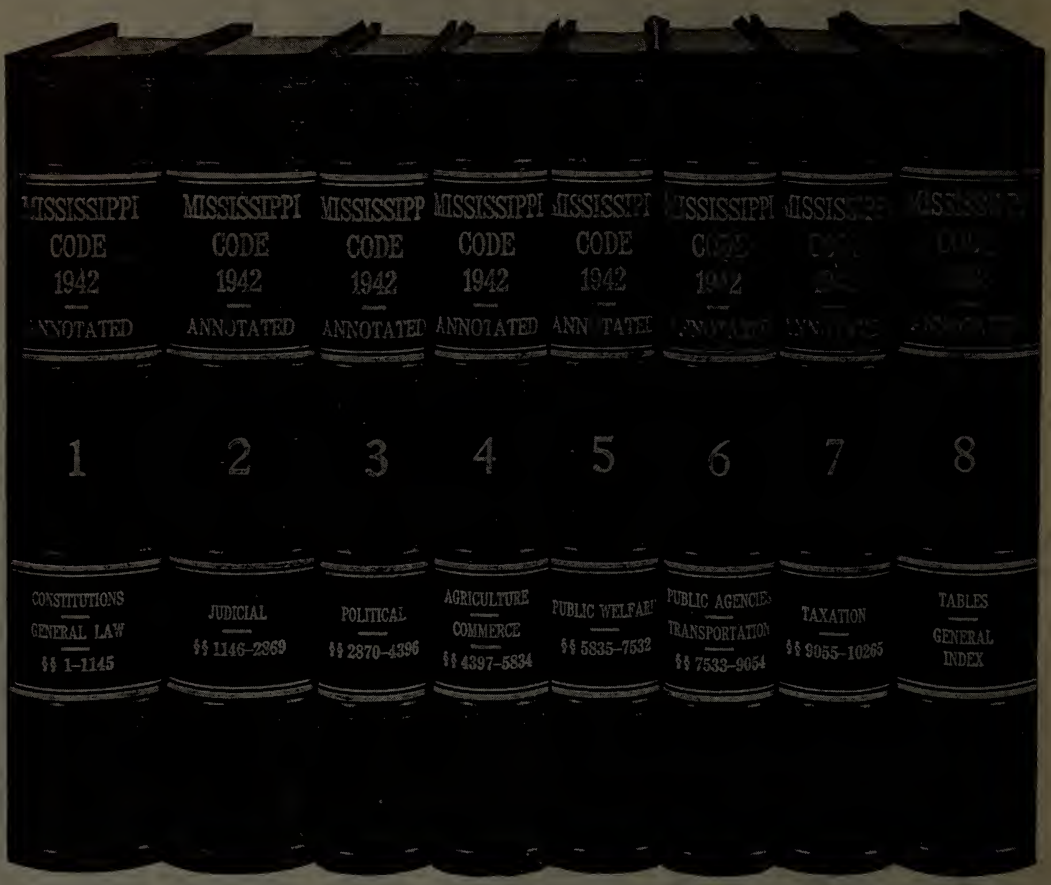

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[*Justice Holmes.*]

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AUTHORITY OF CONGRESS TO MODIFY AND EXTEND CORPORATE CHARTERS GRANTED BY THE STATE

R. V. Fletcher★

Lawyers, in their dealings with corporations, and particularly in considering the extent of corporate powers, think of them as deriving all their powers from the States. For it is true that the vast majority of corporations have been chartered by one or more of the States. Obviously, in view of the fact that in the States reside all residual powers, among which is the authority to create corporations, we may expect that ninety-five per cent of the corporations are creatures of the States.

Corporations can exist only with the consent of the sovereign, and in any consideration of the extent and scope of corporate powers, necessarily there must be some consideration of the character of the sovereign and limitations, if any, upon its authority. This observation has little application to ordinary State charters, since except for respects in which State authority is limited by provisions of the Federal Constitution, the power of the States as sovereigns is theoretically unlimited.

When we come, however, to a consideration of the authority of the Federal Government in the premises, we are immediately confronted with the necessity of examining the field of delegated powers. That the Federal Government may grant charters to corporations as a means of implementing such authority as is granted by the Constitution was settled as far back as 1819. In that year, Chief Justice Marshall rendered his epoch-making opinion in *McCulloch v. Maryland*.[1] The case is too familiar to justify extended quotation or discussion. However, certain expressions in this classic opinion may be recalled as forming a basis for our argument here:

> "The government is acknowledged by all, to be one of enumerated powers. . . . If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. . . . Among the enumerated powers, we do not find that of establishing a bank or creating a

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[1] 4 Wheat. 315, 4 L. ed. 579 (U. S. 1819).

> corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; . . . The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to objects committed to the other. . . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which can not be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."[2]

As a result of this and similar reasoning, the court held that Congress had the power to create a banking corporation as incidental to the powers plainly enumerated in the Constitution.

In accordance with the doctrines so ably and clearly presented in this great opinion, the Federal Government has created, from time to time, corporations to carry out and implement its enumerated powers. As an instance of such action, reference may be made to the Act of Congress[3] incorporating the Texas and Pacific Railway Company. The significance and legality of this assertion of power by the Congress were under consideration by the Federal Court in *Mercantile Trust Co. v. Texas & Pacific Ry.*[4] In that case, Judge Saunders, called upon to decide whether a certain constitutional provision of Louisiana, attempting to penalize corporations for resorting to the Federal courts, contravened the provisions of the Federal Constitution, had occasion to discuss the question of the power of Congress to charter railroad companies. It is stated in the opinion:

> "It is now settled, beyond controversy, that, under the powers to regulate interstate commerce, to establish post roads, and to provide such facilities as it may deem proper, and as military exigencies, when they arise, may require for the transportation of troops and munitions of war, Congress has the power to charter and organize a corporation for the purpose of building and operating a railroad whereon interstate commerce may be conducted, and the mail, and troops, and munitions of war may be transported."[5]

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[2] *Id.* at 405-410.
[3] 16 STAT. 53 (1871).
[4] 216 Fed. 225 (E. D. La. 1908).
[5] *Id.* at 230.

Among the authorities cited by Judge Saunders is the case of *Luxton v. North River Bridge Co.*[6] In that case, there was involved the question of the authority of Congress to create a corporation to build a bridge across navigable water between two States. Going back to the *McCulloch* case as the source of the fundamental principles involved, Justice Gray, reviewing all the authorities, used this language:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end."[7]

After citing familiar language from Marshall's opinion in the McCulloch case, Justice Gray observes:

> "Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."[8]

The court therefore saw no reason why Congress could not, either directly or through such corporations as it might see proper to create, construct bridges over streams, whether navigable or non-navigable, as the demands of commerce may require.

Congress, sure of its ground by reason of such decisions, has from time to time created corporations for various purposes, all as instrumentalities in carrying out its enumerated powers. As an example, mention may be made of the powerful Reconstruction Finance Corporation, created by Act of Congress approved January 22, 1932, designed to improve business conditions by the use of the credit of the United States. The original Act has been frequently amended, so that there is scarcely an instance of business hardship which the Corporation may not relieve. Under authority of Congress, conferred either expressly or by necessary implication, the R. F. C. has from time to time organized subsidiary corporations, taking out charters under the laws of Delaware, which has been found to be a convenient jurisdiction for this purpose.

These preliminary observations and references to well established principles are, however, merely the prelude to the real question we are examining, viz.: to what extent may Congress supplement or modify the powers granted by a State to one of its own corporations. There

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[6] 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808 (1894).
[7] *Id.* at 529.
[8] *Ibid.*

can be no doubt as to the power of Congress to create a corporation of its own to carry out a Federal purpose. May it endow a state-formed corporation with additional powers and thereby equip it the better to accomplish the purposes of Congress?

In examining this question, we may well begin with an old case, *California v. Central Pacific Ry.*[9] The opinion in this case deals with the status of a number of railroads, of which we need here to refer only to the Central Pacific and the Southern Pacific. These were tax cases. They involved a consideration of the tax laws of California in many respects not necessary for us to discuss here. But one of the important questions had to do with the right of the State of California to tax franchises of these railroads, allegedly conferred by Acts of Congress. The Central Pacific was, originally at least, a corporation of the State of California. Under its State charter, it had authority to construct a line of railroad from Sacramento to the eastern boundary of the State. Quite obviously, the State of California could not authorize one of its corporations to extend its railroad into another State without the consent of its neighbor. But Congress, in the exercise of its authority to regulate commerce, in effect authorized the Central Pacific Company and its successor to construct its line eastward from the eastern boundary of California through the territories of Nevada and Utah, until it formed a junction with the Union Pacific at Ogden, in the latter Territory. Under the powers conferred by Congress, also, the Central Pacific had consolidated with the Western Pacific, likewise a corporation of the State of California, under the name of the Central Pacific.

Indeed, so extensive were the powers and franchises conferred by the Congress, that the Central Pacific in this case stoutly maintained that it had become a Federal corporation. It was not contended that it was so by reason of express language so providing in any Act of Congress. The contention, rather, was that Congress had gone so far in conferring authority upon this State corporation that it had been transformed by operation of law from a State to a Federal corporation. It was no longer a sheep, but a wolf in sheep's clothing. The Supreme Court, in upholding the validity of the Federal grants of power, did not find it necessary to decide whether the Central Pacific, as it stood at the time of the litigation, was technically a State or a Federal corporation. The court, in discussing the matter, said:

> "If, therefore, the Central Pacific Railway Company is not a Federal corporation, its most important franchises including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress."[10]

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[9]127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150 (1887).
[10]*Id.* at 39.

This expression would clearly indicate that the court did not deem it as a matter of importance whether the Central Pacific was regarded legalistically as a Federal or a State corporation, so far as the validity of its federally granted franchises was concerned. Discussing the question of power, the court says:

> "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce."[11]

Not only did this case deal with the Central Pacific, interested in a railroad eastward from the Golden Gate, but it deals also with the Southern Pacific, which looked southward from San Francisco. The opinion points out that the Southern Pacific was a California corporation, authorized to construct a railroad from San Francisco to Los Angeles, but not to the Colorado River. By Act of Congress, it was given authority to extend its line to the Colorado River, there to connect with another federally authorized line, the Atlantic and Pacific.

It was not argued, so far as I can find, that the Southern Pacific had become a Federal corporation through the operation of the infiltrating process. Certain it is that the Southern Pacific is now a Kentucky corporation, just as the Central Pacific is a Utah corporation.

We have devoted some time to this case, as it has been recognized as a leading case, often quoted and in some instances made the basis for decision. Thus, in *Southern Pacific Ry. v. United States*,[12] it was said:

> "Neither does the fact that the line of road contemplated by the Southern Pacific's charter, at the time of the passage of the Act of 1866, was along the western border of the State, prevent the operation of the grant. It is well settled that Congress has power to grant to a corporation created by a State additional franchises—at least franchises of a similar nature."[13]

In *Cherokee Nation v. So. Kan. Ry.*,[14] where a railroad company had been granted a right of way through Indian lands, and the validity of the grant was questioned, the court said:

> "It is true that the Company authorized to construct and maintain it is a corporation created by the laws of a state, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the act of 1884. Other means might have been employed, but those designated in that act, although not indis-

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[11] *Ibid.*
[12] 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 519 (1902).
[13] *Id.* at 525.
[14] 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 (1890).

pensably necessary to accomplish the end in view, are appropriate and conducive to that end, and therefore within the power of Congress to adopt."[15]

In *Latinette v. City of St. Louis,*[16] the city of St. Louis undertook to condemn certain lands located in Illinois, giving as authority for the exertion of this extra-territorial power an Act of Congress so providing. This action of Congress being challenged, Judge Baker, as the organ of the Court of Appeals for the Seventh Circuit, with characteristic vividness of expression, asserted:

> "Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority not the parentage or birthplace of the agent."[17]

The same court, in *Hiatt v. United States,*[18] in passing upon the question of whether Congress could authorize a State bank to become part of the Federal Reserve System, used this language:

> "If, in the wisdom of Congress, it seemed that the inclusion of state banks and trust companies would contribute to such and other legitimate purposes of the Federal Reserve System, the right to so include them would seem not now open to question. The government may make use of concerns incorporated under state charters."[19]

These cases and many others which diligent research would develop seem to establish the principle, beyond question, that Congress, in the process of regulating commerce, can bestow powers upon state corporations in addition to those granted by the statutes of the State. Indeed, it can be asserted confidently that such state corporations may be empowered by Congress not only to exert additional powers, but to disregard and disobey positive restrictions and prohibitions contained in State statutes. Thus, a Wisconsin statute prohibited railroad companies from charging passenger fares in excess of two cents a mile. Congress, however, having authorized the Interstate Commerce Commission to set aside State statutes that may be found to interfere with interstate commerce, the court, in *Railroad Commission of Wisc. v. Chicago B. & Q. R. R.,*[20] upheld such action. So, in *Texas v. United States,* [21] the Supreme Court upheld the right of the Interstate Commerce Commission to permit the Kansas City Southern Railway to remove its principal offices and shops

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[15] *Id.* at 657.
[16] 201 Fed. 676 (C. C. A. 7th, 1912).
[17] *Id.* at 679.
[18] 4 F. (2d) 374 (C. C. A. 7th, 1924).
[19] *Id.* at 377.
[20] 257 U. S. 563, 42 S. Ct. 232, 66 L. ed. 371 (1921).
[21] 6 F. Supp. 63, *aff'd,* 292 U. S. 522, 54 S. Ct. 819, 78 L. ed. 1402 (1933).

from Texas, on the ground that such action was essential to economical operation in interstate commerce, although a State law required the retention of these facilities in the State.

A case which hits more closely at the point we are considering is *New York, ex rel. Brixton Corp. v. United States.*[22] In that case, it was shown that the charter of the New York Central Railroad granted by the State of New York provided that no more than two cents a mile should be collected from passengers between Albany and Buffalo. The Interstate Commerce Commission held, however, that any fare less than 3.6 cents per mile on this line would be a discrimination against interstate commerce. The Supreme Court, in an opinion by Chief Justice Taft, upheld this conclusion of the Commission, saying upon this point:

> "The next objection is that the State has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that, if the Transportation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of Section 10, Article I of the Federal Constitution. That section provides that 'no *State* shall . . . pass any law impairing the obligation of contracts,' and does not in terms restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 230: 'Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' *Louisville & Nashville Railroad Co. v. Mottley,* 219 U. S. 467. See also *Scranton v. Wheeler,* 179 U. S. 141, 162, 163; *Union Bridge Co. v. United States,* 204 U. S. 364, 400."[23]

There would seem to be, therefore, little or no question as to the supremacy of Federal power in the field of interstate commerce. State laws and restrictions, contracts between the State and its citizens and limitations upon corporate power must all yield to the superior right of Congress to regulate commerce and in the course of such regulation to adopt such means as seem to it essential to the proper implementation of the authority.

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[22] 257 U. S. 591 (1921), 42 S. Ct. 239, 66 L. ed. 385 (1921).
[23] *Id.* at 600.

It was upon some such theory that Congress, in revising the Interstate Commerce Act in 1940 and in dealing with questions of acquisition of one carrier by another and questions of consolidation, went into some detail with respect to the manner in which the appropriate corporate action should be taken authorizing consolidations or similar transactions. Subsection (11) of Section 5 of the Interstate Commerce Act[24] is an illustration of the extent to which Congress has gone in dealing with such matters.

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[24]"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." 54 STAT. 905 (1940), 49 U. S. C. A. § 5 (11) (1942).

HOCUS-POCUS LEGAL PROCEDURE—A NEED FOR REFORM

O. B. Triplett, Jr.★

The law of procedure in Mississippi should provide the machinery for the accurate, rapid and economical settlement of litigated controversies. But more often our procedural process has become an end in itself and the settlement of controversies has been made to depend less upon their merits in law and fact than upon a trial by combat, a combat of lawyer's wits.[1] Hocus-pocus procedure it is to the laity.[2]

The system of procedural law in many states is neither accurate nor rapid; it is costly both for the parties and the public. Is it little wonder therefore, that the present, growing tendency is to remove more and more controversies from the sphere of judicial settlement, and that administrative tribunals have so rapidly multiplied that we are now living in a Wonderland of Bureaucracy? Certainly our antiquated mechanics of litigation have largely contributed to the transition. Business men prefer to arbitrate disputes rather than incur the delays and expense of court proceedings.

★Member Mississippi Bar, Forest, Miss.

[1]"Jim was equal to any of them in law, knowledge and talent, and superior in application and self-confidence, if that last *could* be justly said of mere humanity. He rode over *us* rough-shod, but we forgave him for it in consideration of his worrying the elders, and standing up to the rack. He was the best lawyer of his age I had ever seen. He had accomplished himself in the elegant science of special pleading, had learned all the arts of confusing a case by all manner of pleas and motions, and took as much interest in enveloping a plain suit in all the cobwebs of technical defence as Vidocq ever took in laying snares for a rogue. He could 'entangle justice in such a web of law,' that the blind hussey could have never found her way out again if Theseus had been there to give her the clew. His thought by day and his meditation by night, was special pleas. He loved a demurrer as Domine Dobiensis loved a pun, with a solemn affection. He could draw a volume of pleas a night, each one so nearly presenting a regular defence, that there was scarcely any telling whether it hit or not. If we replied, ten to one he demurred to the replication, and would assign fifteen special causes of demurrer in as many minutes. If we took issue, we ran an imminent risk of either being caught up on the facts, or of having the judgment set aside as rendered on an immaterial issue. It was always dangerous to demur, for the demurrer being over-ruled, the defendant was entitled to judgment final. Cases were triable at the first term, if the writ had been served twenty days before court. It may be seen, therefore, at a glance, with an overwhelming docket, and without books, or time to consult them if at hand, and without previous knowledge, we were not reposing either on a bed of roses or of safety." Baldwin, *The Flush Times of Alabama and Mississippi*, p. 60.

[2]"The law is a sort of hocus pocus science." Charles Macklin, *Love A La Mode.*

Apparently the dexterity and legal legerdemain of the English barristers had a similar reaction on Shakespeare:

"But in these nice sharp quillets of the law, Good faith, I am no wiser than a daw." *King Henry VI,* Part I, Act II, Sc. 4.

"Why, may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures and his tricks?" *Hamlet,* Act V, Sc. 1.

The fact is that, both for litigants and the public, our system of civil procedure does not work well. We lawyers are so accustomed to the law's delays that we fail to notice the cost to our clients in money, time and trouble. Therefore, in discussing our procedural problems we must appraise them not from the viewpoint of bench and bar, but from that of the lay public.

All can agree that, in its objectives, pre-trial procedure should embrace the following: (1) a simplification of the pleadings; (2) an accurate formulation of the issues to be tried; (3) the elimination of trials by settlement and summary judgments wherever possible; (4) the avoidance of surprise; (5) economy of time and money to the parties and the public; and (6) the elimination of specious procedural tactics which enable a litigant with a long purse and a wily lawyer to weary his adversary into settling his claim on a nuisance basis.

THE PLEADINGS

The pleadings should serve to inform each side of the contentions of the other as to matters of fact. They should tell the defendant what he is being sued for; they should also tell the plaintiff what defenses the defendant proposes to make. They should narrow the issues to those in *bona fide* controversy and should separate issues of law from issues of fact.

In the age of the Year Books, common law procedure consisted of oral pleading before the judge, who permitted the parties to state and re-state their views until an issue of law or fact was reached upon which both sides were ready to stand. But in the transition to written pleadings, this stage of procedure was left to unsupervised counsel, with the result that today the entire pleading process of our State is a matter for the lawyers of the parties. Our trial court is only called upon to rule on motions and demurrers; he exercises no active control over the pleading stage of the litigation. This result, coupled with the necessary statutory enactments designed to permit special pleading, permits adroit lawyers to engage in legal fisticuffs at the expense of the parties and the public; and general, obscure issues are developed over a tortuous path.[3]

The Federal Rules of Civil Procedure largely dispose of the technicalities of common law pleading, which concerns itself with how the parties have formulated the issues. The general objective is that "all plead-

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[3]"What is to be said for an attorney who, defending an action on a note, denies signature, but says his client paid it, and for good measure pleads the general denial, want of consideration, failure of consideration, alteration, duress and anything else he can think of. . . . This is no fanciful plea. I can show you plenty of such pleas." Bolster, *The Municipal Court* (1938) 134 Boston Bar Bull. 37.

ings shall be so construed as to do substantial justice."[4] The philosophy of the Federal Rules is to lessen the pleader's burdens.[5]

If one compares the Federal Rules in the field of pleading with those prevailing in Mississippi, the advantages of the Federal Rules at once become obvious.

Rule 5 permits the service of every pleading subsequent to the original complaint and every motion, written notice, order, and similar paper to be made by and upon the attorneys for the litigants either by personal delivery or by mailing. Section 2994, Code of 1930, requires that all notices provided for by law shall be made by a public officer.

Rule 8(a) only requires of the plaintiff "a short and plain statement of the claim showing that the pleader is entitled to relief." It does not require a statement of the ultimate facts upon which the plaintiff asks relief; and under Rule 8(e) the complaint shall be "simple, concise and direct," and may be in the alternative. Thus a complaint is good which alleges alternative grounds for relief, as in a personal injury suit, that the defendant "wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against the plaintiff."[6] And, although Section

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[4]FED. RULES CIV. PROC. 8 (f); Maty v. Grasselli Chemical Co., 303 U. S. 197, 58 S. Ct. 507, 82 L. ed. 745 (1938). The new rules of civil procedure were intended to achieve simplicity and clarity of pleading. McKenna v. United States Lines, 26 F. Supp. 558 (S. D. N. Y. 1939); Buckley v. Music Corp. of America, 1 F. R. D. 602 (D. Del. 1941). Technical forms are eschewed, Tahir Erk v. Glenn L. Martin Co., 32 F. Supp. 722 (D. Md. 1940), *rev'd* 116 F. 2d 865 (C. C. A. 4th, 1941); Venn-Severin Machine Co. v. John Kiss Sons Textile Mills, 2 F. R. D. 4 (D. N. J. 1941) and all refinements of pleading are subordinated to the aim of achieving substantial justice. Metzger v. Breeze Corporations, 37 F. Supp. 693 (D. N. J. 1941). The new rules of procedure are based on the theory of a rather general form of pleading, Venn-Severin Machine Co. v. John Kiss Sons Textile Mills, *supra,* the object of which is to give the opposite party fair notice of the claim that will be made against him or of the defense that will be interposed, Kellogg Co. v. National Biscuit Co., 38 F. Supp. 643 (D. N. J. 1941); Metzger v. Breeze Corporations, *supra;* United States v. Johns-Manville, 1 F. R. D. 548 (E. D. Ill. 1941), rather than to frame issues. Kellogg Co. v. National Biscuit Co., *Supra;* Battin Amusement Co. v. Cocalis Amusement Co., 1 F. R. D. 769 (D. N. J. 1941). The purpose implicit in the rules is to have brief, conclusive pleadings, Fleming v. Wood-Fruiticher Grocery Co., 37 F. Supp. 947 (N. D. Ala. 1941) and it is required that there be simple, concise, and direct denials, admissions, and averments in pleadings; Cater Construction Co. v. Nischwitz, 111 F. 2d 971 (C. C. A. 7th 1940); Metzger v. Breeze Corp., *supra;* Venn-Severin Machine Co. v. John Kiss Sons Textile Mills, *supra;* Strahle-Johnson Supply Co. v. John Douglas Co., 1 F. R. D. 279 (N. D. Tenn. 1940) but the liberalization of practice does not obviate the necessity of reasonable definiteness. Sweeney v. Buffalo Courier Express, 35 F. Supp. 446 (W. D. N. Y. 1940).

[5]Official forms are provided; a short and plain statement of the claim is the only requirement, FED. RULES CIV. PROC. 8(a); alternative pleading is authorized, FED RULES CIV. PROC. 8(e) (2); the pleading of special matter is simplified, FED. RULES CIV. PROC. 9; the form of pleadings is simplified, FED. RULES CIV. PROC. 10; and the number of pleadings required is shortened, FED. RULES CIV. PROC. 7(a).

[6]Official Form 10. These official forms also indicate the simplicity which is sanctioned under the Federal Rules.

521, Code of 1930, has served to abolish common law forms of action,[7] much more liberality in pleading is given the plaintiff under the Federal Rules.[8]

Furthermore, under Rule 20, "all persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action." And "All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law of fact common to all of them will arise in the action." Such is not the law in Mississippi but ought to be.[9] The Federal Rule quoted is based on trial convenience. and is designed to permit the joinder of plaintiffs or defendants whenever there is a common question of law or fact.[10]

Rule 12 requires the defendant to "serve his answer within 20 days after service of the summons and complaint upon him"; and the rule also expedites the formulation of the issues. And Rule 55 provides that the Clerk of the Court, as the case may be, may, upon failure to plead, enter judgment against the defaulting party. Under the prevailing Mississippi statutes, no pleading is due until the return term,[11] even though it is often six months distant; no judgment by default may then be rendered, if substituted service was had on the defendant;[12] and if

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[7]Evans v. Miller, 58 Miss. 120 (1880).

[8]*Cf.* Hazlehurst v. Cumberland Tel. Co., 83 Miss. 303, 35 So. 951 (1903); Illinois Central Ry. v. Abrams, 84 Miss. 456, 36 So. 542 (1905).

[9]*Cf.* Denkmann Lumber Co. v. Henderson, 14 So. (2d) 213 (Miss. 1943), in which husband and wife owned 40 acres jointly; the wife, an adjoining 60 acres separately; and the husband was in possession of the whole. Both plaintiffs derived title subject to the same timber reservation which defined and limited the defendant's cutting rights. Yet a misjoinder was declared, which will result in separate trials entailing unnecessary court expense, and delay to the litigants and inconvenience to the witnesses.

[10]Moore, Federal Practice, p. 2165.

Joinder of plaintiffs: Thomson v. United Glazing Co., 36 F. Supp. 527 (W. D. N. Y. 1941); Middleton v. Coxen, 25 F. Supp. 632 (M. D. Pa. 1938); Stanolind Oil & Gas Co. v. Doyle, 38 F. Supp. 893 (E. D. Tex. 1941), *aff'd* 123 F. (2d) 900 (C. C. A. 5th, 1941).

Joinder of defendants: Securities & Exch. Com. v. Timetrust, Inc., 28 F. Supp. 34 (N. D. Cal. 1939); Citizens Bank of Ashville v. Cameron & Co., 40 F. Supp. 1002 (S. D. Ohio 1941); Wyoga Gas & Oil Corp. v. Schrack, 27 F. Supp. 35 (M. D. Pa. 1939), 29 F. Supp. 582 (M. D. Pa. 1939); Ritter v. Wyoga Gas & Oil Corp., 110 F. (2d) 524 (C. C. A. 3rd, 1940) *cert. denied*, 311 U. S. 669, 61 S. Ct. 29, 85 L. ed. 430 (1940); Sammons v. Larkin, 38 F. Supp. 649 (D. Mass. 1940); Alston v. School Board of Norfolk, 112 F. (2d) 992, 130 A. L. R. 1506 (C. C. A. 4th, 1940), *cert. denied*, 311 U. S. 693, 61 S. Ct. 75, 85 L. ed. 448 (1940).

[11]Miss. Code Ann. (1930) § 575, 2978.

[12]Miss. Code Ann. (1930) § 575.

the plaintiff's declaration is successfully demurred to, the probability is that the trial judge will continue the cause for the term.

The disadvantages under such procedural rules are manifest. The plaintiff's right to judgment is unreasonably delayed; no opportunity for a careful formulation of the issues is afforded; no pre-trial conferences can be held; no pre-trial examination of adverse parties, witnesses and no discoveries by interrogatories and inspection of documents may be obtained. All must await the first day of the return term, before which the cause ought to have either been settled or disposed of or been made ready for trial on narrowed issues.

Rule 12 is designed to expedite the presentation of defenses and objections in point of law. It affords an easy method for the presentation of defenses, but at the same time prevents their use for purposes of delay. All defenses are presented by motion or pleading.[13] All distinctions between demurrers, motions, exceptions for insufficiency, and pleas are avoided. Special appearances to challenge jurisdiction over the person or improper venue are not necessary; matters in abatement and bar can and must be joined.[14] Furthermore, under Rule 8(b),[15] subject to the obligation of Rule 11, a lawyer can use a general denial when, *and only when,* he can in good faith fairly deny all the averments of the opposing party's pleading. A reputable attorney cannot file sham or frivolous pleadings and motions, or insert scandalous and indecent matter. An attorney who does resort to such tactics may be disciplined,

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[13]FED. RULES CIV. PROC. 12 (b): Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

[14]MOORE, FEDERAL PRACTICE, p. 627.

[15]Following the practice which formerly prevailed under Equity Rules, rule 30, *In re* Dato, 99 F. (2d) 703 (C. C. A. 7th, 938), it is required by FED. RULES CIV. PROC. 8 (b) that a party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. Chicago Pneumatic Tool Co. v. Ziegler, 40 F. Supp. 416 (E. D. Pa. 1941). Under FED. RULES CIV. PROC. 8 (d), the failure to deny allegations of the complaint constitutes an admission of such allegations. Sun-Maid Raisin Growers Ass'n. v. Neustadter Bros., 115 F. (2d) 126 (C. C. A. 9th, 1940). Under FED. RULES CIV. PROC. 12 (b) defendant may at his option plead certain defenses by motion rather than by answer, as for example the defense of lack of jurisdiction over the subject matter. Hale v. Campbell, 40 F. Supp. 584 (C. D. Iowa 1941). Under FED. RULES CIV. PROC. 8 (c) defendant must plead matter constituting an avoidance or affirmative defense in order to raise an issue as to such matter. Eberle v. Sinclair Prairie Oil Co., 35 F. Supp. 296 (E. D. Okl. 1940), *aff'd* 120 F. (2d) 746, 135 A. L. R. 1494 (C. C. A.

and the pleading or motion which violates the spirit of the rule may be stricken.[16]

While this procedure would be an innovation in Mississippi law courts, it is most desirable and would greatly simplify our present practice.

For example, Section 533, Code of 1930 provides:

> "The following pleas in bar, or any two or more of them, may be pleaded together as of course, when appropriate to the action, without leave of the court or judge, to wit: The general issue, denial of debt or contract sued on, tender in whole or in part, statute of limitations, set-off, plene administravit, infancy, payment, accord and satisfaction, release, not guilty, a denial of plaintiff's property in the thing injured, leave and license, duress, son assault demesne, performance, jurisdiction in libel, slander and other actions, and any other pleas which by law are allowed to be pleaded together."

This statute permits the most bizarre pleading of inconsistent defenses;[17] while, on the other hand, the unwary lawyer can subject his

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10th, 1940); but this rule applies only when there is a necessity of filing a pleading setting up any of the particular defenses recited therein and which necessarily raises disputed questions of fact or law. Miller v. Hoffman, 1 F. R. D. 290 (D. N. J. 1940). Defendant in his answer may raise such defenses as *res judicata*. Consolidated Freightways v. Railroad Commission of Cal., 36 F. Supp. 269 (S. D. Cal. 1941), or failure to state a cause of action on which relief can be granted, Goodman v. United States, 28 F. Supp. 497 (W. D. Iowa 1939), *aff'd* 113 F. (2d) 914 (C. C. A. 8th, 1940); and the defense of multiplicity of suits should be raised in this manner. Sproul v. Gambone, 34 F. Supp. 441 (W. D. Pa. 1940). Under Fed. Rules Civ. Proc. 8 (b), it is required that, if a party is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state, and this has the effect of a denial. Merchants Indemnity Corp. of New York v. Peterson, 113 F. (2d) 4 (C. C. A. 3rd 1940); Ice Plant Equipment Co. v. Martocello, 43 F. Supp. 281 (E. D. Pa. 1941); Levin v. Brunberg, 42 F. Supp. 747 (E. D. N. Y. 1942).

[16] *Cf* Moore, Federal Practice, p. 615: Simpson, *A Practical Solution of the Pleading Problem* (1939) 53 Harv. L. R. 186.

[17] "Under this special act of the legislature, and under our practice of pleading today in Mississippi, what can the defendant plead to the ordinary action at law brought in our law courts? Take this, as an example: A sold to B a hay press, including the motive power to operate it. B has died and C has been appointed as his administrator. A sues C, the administrator, on the note given for that hay press and the gasoline motor to operate it. C comes in and defends. First, he files the general issue. He denies that he owes the debt. He may file these additional pleas—special pleas, or give notice under the general issue, as we generally and frequently do: First, he could plead *non est factum*—that there was no note signed. Second, he could plead infancy—that the deceased was an infant when he signed the paper, if any was signed. He could plead duress, and he could plead insanity—that the deceased did not have sufficient mental capacity to execute the contract. He could plead breach of warranty—that the machine didn't come up to the warranty under which the instrument was sold at the time. He could plead also that the machine was worthless and no account, and was not of any value. He could plead *plene administravit*—that the estate was administered and therefore there was nothing left for him. And you can imagine how many other pleas that defendant could make.

"But, you say nobody would do that. You would be surprised if you go over the

client to severe penalties for mispleading.[18] Moreover, under our code sections, pleas of recoupment and set off are not wide enough in scope to afford opportunity for both parties litigant to have their full controversy settled and determined in one action,[19] recoupment being purely defensive and confined to the transaction on which the plaintiff's claim is brought, while set off is unavailable where the damages are unliquidated. Also under the Federal Rules, it is wholly unnecessary to obtain leave of court to fully plead in answer to the defendant's defense as is required by Mississippi statute.[20] And this simplified form of pleading is aided and improved by the other rules which will be next discussed.

DISCOVERY

The common law provided no means for eliciting the facts of a litigated cause prior to trial except in so far as they were brought out by the pleadings, supplemented in some cases by a bill of particulars. There was no means of examining the adverse party nor in ascertaining the character of testimony to be expected from adverse witnesses. The result was that surprise at the trial was common; and often the determination of the cause would depend on the lawyers' maneuverings and skill.

One of the important reforms of the last century was to substitute statutory procedures for the examination of adverse parties and the taking of depositions in the law action itself, and such procedures are now available in almost every jurisdiction.[21] Usually either party may examine the other before trial—sometimes orally and sometimes by written interrogatories, sometimes by either method at the election of the examining party—and require the production of documents or admissions as to their genuineness.

This long felt need for legal machinery to produce a full disclosure of the real points in dispute between the parties and of affording an adequate factual basis in preparation for trial is adequately provided for in Rules 26-37 of the Federal Rules.[22] Full and equal, mutual discovery in advance of trial is thus provided and the efficiency of the administration of justice is greatly increased. The opportunity for perjury and

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country sometimes and meet with some of these pleas, which are apparently inconsistent, yet they may be consistent as far as that statute is concerned. This man could also plead payment. He could plead payment in part and tender for the rest. He could say there never was a sale but there was a loan of the property and he had returned it." Tubb, (1933) 6 Miss. L. J. 64.

[18]Miss. Code Ann. (1930) § 534.

[19]Miss. Code Ann. (1930) § 537.

[20]Miss. Code Ann. (1930) § 542.

[21]*Cf.* Simpson, *The Pleading Problem,* (1939) 53 Harv. L. R. 190.

[22]The scope of discovery under Fed. Rules Civ. Proc. 33 may vary with the special circumstances of the case. United States v. American Solvents & Chemical Corp. of Cal., 30 F. Supp. 107 (D. Del. 1939). It is immaterial whether the matters

manufactured testimony is largely cut off and the witnesses can be examined while their memory is fresh. Such procedure preserves the testimony of witnesses or litigants who may afterwards die; it educates the parties in advance as to the real merits of the controversy; it encourages settlements out of court; and safeguards against surprise at the trial.

Rule 36 also provides a special procedure whereby either party may request his adversary to admit, for the purposes of the pending action only, both (1) the genuineness of any relevant document, and also (2) the truth or existence of any relevant facts. The procedure for obtaining admissions under Rule 36 is preferable to the procedure of serving interrogatories under Rule 33, when admissions of specific matters, which are not really in dispute, are sought. And Rule 37(c) insures the successful operation of Rule 36 by permitting the court, for a wrongful denial of genuineness or of facts, to tax all expenses and attorney's fees incurred in their proof upon the party denying their existence.

It will at once be seen that the procedure in Mississippi is wholly inadequate to achieve such salutory results. We can propound interrogatories to a *non-resident party,*[23] but then only after the cause is at issue;[24] and our procedure for examining witnesses in advance of trial is wholly inadequate.

Rule 34, while similar to our statute[25] permitting inspection of documents, is much more liberal,[26] our statute having been construed to be

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are as much within the knowledge of the interrogating party as within that of the adverse party, Kingsway Press v. Farrell Pub. Corp., 30 F. Supp. 775 (S. D. N. Y. 1939); Byers Theaters v. Murphy, 1 F. R. D. 286 (W. D. Va. 1940); the disclosure sought is not limited to material or ultimate facts but extends to all facts, whether ultimate or evidentiary, which are relevant, Munzer v. Swedish American Line, 35 F. Supp. 493 (S. D. N. Y. 1940) and competent, Landry v. O'Hara Vessels, 29 F. Supp. 423 (D. Mass. 1939) excepting matters which are privileged; Munzer v. Swedish American Line, 35 F. Supp. 493 (D. N. Y. 1939) and interrogatories may obtain disclosure of names and addresses of witnesses, Kingsway Press v. Farrell Pub. Corp. 30 F. Supp. 775 (S. D. N. Y. 1939). Discovery may also be had to ascertain facts relating not only to the party's own case but also to his adversary's. Nichols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938). On the other hand, both law and reason dictate that the scope of interrogation under the rule shall not be entirely without limitation. Coca-Cola Co. v. Dixi-Cola Lab., 30 F. Supp. 275 (D. Md. 1939); Landry v. O'Hara Vessels, 29 F. Supp. 423 (D. Mass. 1939); Byers Theaters v. Murphy, 1 F. R. D. 286 (W. D. Va. 1940).

[23]Miss. Code Ann. (1930) § 1551.

[24]Givens v. Southern Express Co., 106 Miss. 834, 64 So. 737 (1914).

[25]Miss Code Ann. (1930) § 744.

[26]Fed. Rules Civ. Proc. 34 was adopted with a view to simplifying the issues and should be liberally construed, Gielow v. Warner Bros. Pictures, 26 F. Supp. 425 (S. D. N. Y. 1939); Canty v. Great Lakes Transit Corp., 2 F. R. D. 156 (W. D. N. Y. 1941); it must be construed *in pari materia* with rules 45 (b), providing for a subpoena for the production of documentary evidence, Conn. Importing Co. v. Continental Distilling Corp., 1 F. R. D. 190 (D. Conn. 1940); United States v. Aluminum Co. of America, 1 F. R. D. 57 (D. N. Y. 1939), and both rules should be construed *in pari materia* with rule 26, Conn. Importing Co. v. Continental Distilling Corp. *supra.* Fed. Rule Civ. Proc. 26 and 34 should both receive a construction of similar

highly penal, and its powers to be exercised with great caution.[27]

PRE-TRIAL PROCEDURE

Rule 16 provides:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues:

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions."

A royal commission appointed in England in 1936 to consider "the dispatch of business at common law" in the English courts, made a close study of pre-trial procedure as employed in England. The commission reported that the administration of justice was most effectively accomplished by (1) restricting the issues to those seriously contested, and

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scope with respect to their subject matter. Conn. Importing Co. v. Continental Distilling Corp., *supra*.

It is more the purpose of the rule that definite matters which are material and about which information is desired be designated rather than certain books be designated which may or may not contain the information desired. It may be impossible for the plaintiff to know in just what book or what ledger this information is contained but certainly the defendant knows and with that information in mind the defendant knows exactly which books or records it is supposed to produce and which ones it is not required to produce. United Mercantile Agencies v. Silver Fleet Motor Express, 1 F. R. D. 709, 712 (W. D. Ky. 1941).

[27]Equitable Life Assurance Society v. Clark, 80 Miss. 471, 31 So. 964 (1902).

(2) by pre-trial conferences, or as they call it in England, by a "summons for directions."

At a pre-trial conference the judge is given an opportunity to acquaint himself with all phases of the case so that if the case is not thereby settled, he will understand the real issues to be tried and will not have to wait until the witnesses have testified to know what the case is about. The court becomes an active and positive agency in administering justice—not a formal umpire at the trial itself. In a recent statistical report of the work of the Circuit Court of Wayne County, Michigan, it was found that of 4965 cases which became triable causes, 2016 were finally disposed of at the pre-trial hearings. At the pre-trial conference the court may acquire (1) the presentation of all motions; (2) the granting of amendments by both sides to the pleadings; (3) the elimination of issues not in dispute; (4) the preliminary introduction of exhibits and documentary evidence in a cheap and inexpensive way.[28] The Judicial Council of Michigan reported that the pre-trial conferences usually last less than ten minutes.[29]

This procedure would be a complete innovation in Mississippi. It is now provided in Federal Court by Rule 16.[30]

THE SUMMARY JUDGMENT

Summary judgment procedure, like pre-trial procedure, comes to us from England. Its usefulness cannot be doubted. Under Rule 56 any party litigant may, at an early stage in the litigation, move for a summary judgment; and "the judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of the damages,

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[28]For a full discussion of the procedure at a Pre-Trial Conference see MOORE, FEDERAL PRACTICE, p. 820.

[29]Report of the Judicial Council of Michigan (1936) 63, 66.

[30](These rules) "mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game." Sunderland, *Discovery Before Trial Under the New Federal Rules*, (1939) 15 TENN. L. REV. 737, 739.

This rule is procedural in nature and permits the judge before whom matter is brought to determine in his discretion the most feasible way to proceed with trial, to eliminate issues from the trial which are unnecessary to a final disposition, and to eliminate a cumbersome record. Eisman v. Samuel Goldwyn, Inc., 30 F. Supp. 436 (S. D. N. Y. 1939).

This rule was adopted to enable courts to call the parties before them and cut away, by agreement and admission of parties, all encumbrances to a speedy trial on simplified issues. Nichols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938).

"There is another way in which changes in the pleadings may narrow the issue. At each pre-trial hearing, counsel is required to elect as to whether or not they desire to make any amendments to their pleadings. If they waive the right to make amendments, they are bound by such election (subject to special leave of the Court if new facts are discovered). Generally, leave to amend at the trial is denied. Konstantine

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[31]

Under this Rule, the remedy is available in all cases, tort or contract, law or equity, and to either party.[32] Second, and most important, the Rule provides that where it develops that the motion cannot be granted and a trial will be necessary, the court shall if practicable, ascertain "what material facts are actually and in good faith controverted" and shall make an order finding the facts not thus controverted which shall stand as admitted on the trial of the action.[33] Here is a procedure designed to define the real issues in advance of trial and define them on a more adequate basis than by a pre-trial conference, since on motion for summary judgment the judge is to make his findings by examining the evidence before him in addition to the pleadings and by interrogating counsel as to the facts.

The achievement of speedy justice under Rule 56 and its counterparts in other jurisdictions has already been thoroughly established.[34] And for these last aspects of procedure, oral settlement of issues under the supervision of the court, there is the best of common law precedent. It was the custom in the days of the Year Books.

CONCLUSION

If the foregoing rules would be adopted and administered in the courts of Mississippi, it would largely solve our pleading problem; and it could contribute substantially to the wise and effective administration of civil justice.

The State Bar of Mississippi is now making some effort toward procedural reforms in our common law procedure. If we look to the example of England, we learn that reform was prevented by the legal profession until an overwhelming lay sentiment was developed; and that, throughout, the great procedural reforms of the last century were due to a public enlightened by the press, and not, at least initially, to the bench or bar.[35] It is unfortunate that reforms tend to be opposed and emascu-

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v. City of Dearborn, 280 Mich. 310, 273 N. W. 580 (1938). On the other hand, if counsel indicate at the pre-trial hearing that they wish to make amendments, the case is held on the pre-trial docket until all amendments are filed. If counsel have drafted their pleadings in a hurried and careless manner at the time suit was filed, they are given an opportunity to go over them and perfect them. Such amendments are frequently tendered. The effect of such amendments often is to clearly define the one important and controlling issue in the case. When this has been brought out, many less important issues can be disregarded." American Bar Association (1938), Reports of the Section of Judicial Administration.

[31]Fed. Rules Civ. Proc. 56 (c).

[32]Fed. Rules Civ. Proc. 56 (a) (b).

[33]Fed. Rules Civ. Proc. 56 (d).

[34]Moore, Federal Practice, ch. 56.

[35]Clark & Moore, *A New Federal Civil Procedure* (1934) 44 Yale L. J. 390; Sunderland, *The English Struggle for Procedural Reform* (1926) 39 Harv. L. R. 725.

lated by the general opposition of the bar, though it is only human for a successful practitioner to conclude that the practice which he has mastered is a desirable one to follow.

It is to be hoped that the reforms in our procedure can be and will be initiated and effectuated by the bar itself; and that the laity will not decry the law's delay,[36] lose patience with the courts,[37] look upon the lawyers as disguisers,[38] and wish to kill us first of all.[39]

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[36]"For who would bear . . . the law's delay . . .
When he himself might his quietus make with a bare bodkin?" Shakespeare, *Hamlet,* Act III, Sc. 1.

[37]"He must have patience who to law will go;
And should he lose his right, more patience still." Robert Dodsley, *To Patience.*

[38]"They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters." Sir Thomas Moore, *Utopia: Of Law and Magistrates.*

[39]"The first thing we do, let's kill all the lawyers." Shakespeare. *Henry VI,* Part II, Act IV, Sc. 2.

HOW THE ARMY TRANSFORMS LAWYERS INTO JUDGE ADVOCATES★

A. B. Butts★★

The Army must have judge advocates who are trained military lawyers.[1] The ideal judge advocate is a lawyer who has had considerable experience as a line officer, and who therefore is familiar with Army organization and the routine problems of Army administration, and is fully cognizant of the paradoxical thinking of enlisted men. Since times of emergency make it inexpedient to take the necessary time to meet the ideal situation, the ideal must be supplemented by lawyers trained as staff officers. The two groups constitute the trained personnel of the Judge Advocate General's Department.

Members of the Bar—several thousand of them—have shown an interest in the Judge Advocate General's Department by making application for temporary wartime commissions in or with the Department. Lawyers already in the armed forces of the nation, by enlistment and by operation of the Selective Service Act, are eligible for appointment as officers of the Department upon successful completion of an officer candidate course. Others have been commissioned directly from the ranks, but this practice was discontinued with activation of the Judge Advocate General Officer Candidate School.

In an article appearing in the January, 1943, issue of the *Mississippi Law Journal* the author discussed the organization, personnel, and functions of the Judge Advocate General's Department.[2] The purpose of the present article is to discuss the establishment and development of the Judge Advocate General's School.

I.

A brief historical sketch of the school should be of interest. At the beginning of the war there were in the Regular Army 122 lawyers who made up the personnel of the Judge Advocate General's Department.[3]

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[1]Cramer, THE OPERATION OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, *The Judge Advocate General of The Army,* ARMY AND NAVY JOURNAL, anniversary issue, December 7, 1941-December 1, 1942; *United States at War,* pp. 126 and 129.

[2]Butts, *The Judge Advocate General's Department of the United States Army,* (1943) 15 MISS. L. J. 113 (includes a limited bibliography on the subject).

[3]*Id.* at 117.

The Regular Army lawyers, with approximately 500 Reserve Judge Advocates and approximately 60 National Guard Judge Advocates, or a total of around 700 military lawyers, were available at the outbreak of war, but this number was not sufficient for an Army being expanded to unprecedented size.[4] In 1942, The Judge Advocate General of the Army, Major General Myron C. Cramer, called attention to the fact that there were 326 commands or stations at which Judge Advocates were then serving.[5] By July 1943 the number of judge advocates on duty had grown to more than 1200,[6] and at the present time the number is approximately 1500.

It is the policy of the administrative branches of the Army to conduct schools designed to qualify specialists for duty in their respective branches. The judge advocate in peacetime, trained first as a lawyer, becomes familiar with Army law by actual experience in the Office of the Judge Advocate General and in the field. This apprentice system of teaching military law to officers who are lawyers is quite adequate during peacetime, but in wartime they must be field soldiers. In a wartime emergency, as Major Inzer B. Wyatt says:

> "With our active participation in the war . . . time ran out; training through the slow process of apprenticeship became impracticable as the need for such training became more acute. New officers were coming into the Department from civil life to meet the demands of our expanding forces. It is not reasonable to expect even the best lawyer intelligently to advise a commanding general simply by outfitting him with a uniform, any more than it would be possible for an admiralty lawyer without ICC experience to advise a railroad as to its rate litigation. Problems involving the war powers granted by the Constitution or involving the Articles of War and Army Regulations differ markedly from questions arising under the commerce clause, at common law or in connection with the civil practice acts of the states. Moreover, the judge advocate in the field is a member of the fighting team soldiering along with the rest of the unit. Yet the military background of the new officers, even of those who had served with distinction in the first World War, was not sufficient introduction to the modern military machine. In these circumstances The Judge Advocate General of the Army, Major General Myron C. Cramer, directed the develop-

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[4]Major Inzer B. Wyatt, Judge Advocate General's Department, in his article, *The Army's School for Its Lawyers,* (1943) A. B. A. J., 135-137, 177, points out the fact that "a Judge Advocate serves on the staff of each division (roughly 15,000 men), corps (several divisions) and Army (several corps), with task forces, at ports of embarkation and debarkation, at air bases, island bases, and at other military installations in the United States as well as in foreign places. A number of officers must at the same time be available for duty in Washington at the Office of the Judge Advocate General, who acts as general counsel to the War Department."

[5]Cramer, *op. cit.* at 126.

[6]Army and Navy Journal, July 31, 1943, p. 3.

ment of a project for an intensive course of training to afford the proper orientation and indoctrination for bridging the gap between civil and Army life."[7]

The enforcement of the punitive Articles of War is comparatively simple to the trained lawyer, but the administration of military justice in its broader aspects requires an understanding of the mental processes of the average soldier. The control and supervision of court martial procedure, the review of court martial cases, and the administration of military justice utilize only a part of the time of the trained judge advocate on duty with combat troops. The remainder of the time is used in applying his background of civil law to problems of law affecting the military establishment; for it should be noted that the legal duties of the judge advocate are in no wise confined to the administration of military justice, for questions involving almost every conceivable phase of law come to his office; *e.g.,* claims by and against the Government; contracts with the Government; contracts and sub-contracts; patents; copyrights; War Department land purchases, leases, and grants; state and federal taxation; primary investigations respecting litigation involving the War Department; the organization of the Armed Forces; and the rights and obligations of military personnel.[8] Moreover, approximately 2200 statutory enactments of Congress constituting the basis of the military law of the United States, and the approximately six loose-leaf volumes of Army Regulations promulgated in conformity with such statutory enactments, are the constant concern of the judge advocate. Questions of administrative law, particularly those involving inherent powers and the delegation of authority under such powers, are frequently before the judge advocate. This means that the Army lawyer must draw constantly upon his civilian experience and that large body of non-criminal civil law which is always the basis for a sound legal opinion. In addition he must be a trained officer to meet military exigencies in no way connected with the law.

The Judge Advocate General's School, the first of its kind ever established in this country, commenced on February 2, 1942, on the premises of the National University Law School, Washington, D. C., where it continued for nearly eight months, until its removal to the University of Michigan Law School at Ann Arbor, about September 14, 1942. All of its facilities have been most generously placed at the disposal of the Department.

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[7]Wyatt, *op. cit.* at 136.

[8]See *Chronology of the Publications of the Opinions of The Judge Advocate General of the Army,* by Captain Lewis W. Morse, Director of Libraries, Judge Advocate General's Department, Munitions Building, Washington, D. C., Law Library Journal, Volume 35, No. 6, November, 1942, pp. 477-478. This article contains an excellent historical sketch of the Office of the Judge Advocate General of the Army, pages 476-477.

The Judge Advocate General's School was activated at the instance of The Judge Advocate General, Major General Myron C. Cramer; of Brigadier General Edwin C. McNeil, Assistant The Judge Advocate General; and of Colonel Edward H. Young, of the Judge Advocate General's Department, who has been Commandant of the school since its establishment.

The school graduated four classes while in Washington. In the first class there were 47 officers of the Judge Advocate General's Department, all reserve officers who were assigned for a six weeks' "refresher" course and other training. The reserve judge advocates had studied Army Extension Courses prepared by the Judge Advocate General's Department, and most of them had had active duty training at intervals in Judge Advocate Offices, that is, all were lawyers and all had had some training as military lawyers.

The needs of the rapidly expanding Army, however, compelled the training of more officers than were available among the reserves, and the policy of appointing qualified lawyers from civilian life to temporary commissions in the Army of the United States was adopted. Obviously this move required the creation of an agency to transform the civilian lawyer into an officer of the Army, and the already established school proved itself to be the best means of accomplishing this metamorphosis.

As the demand for officers, trained not merely in military law but also in the performance of staff duties generally, became more urgent, military training and military discipline took on increasingly important emphasis, and the term of the course was extended to ten weeks.

The next step in the quest for officers was the appointment of first and second lieutenants from the number of trained lawyers already in the Army as enlisted men, who were carefully selected for military and legal experience. These appointees became students at the school soon after their appointments and were members of the same classes as the officers appointed directly from civil life.

Officers serving in other branches of the Army, such as the Air Corps, Signal Corps, Quartermaster Corps, Corps of Military Police, Transportation Corps, and Finance Department, frequently request assignment to the officer course at the school, and those whom The Judge Advocate General recommends for detail in the Judge Advocate General's Department are ordered to attend the school.

A fourth phase in the flexible program of training personnel began on June 7, 1943, with the activation of an Officer Candidate School, the first in the long history of the Department, and so another reservoir of potentially well-equipped officers has been tapped. The Officer Candidate School supplements but does not supplant the established officers' training course which has proved so successful.

The first officer candidates, who entered on June 7 and finished twelve weeks later on August 28, 1943, were about 80 in number and all had received basic military training before they entered the school. The second officer candidate group, consisting of about 65 lawyers, entered July 26 and will graduate on November 13, 1943, the period of instruction having been extended to 17 weeks.

At the same time that the second Officer Candidate Class entered, the twelfth Officer Training Class commenced study for a like period of 17 weeks and with the advent of the third Officer Candidate Class early in September also came the thirteenth Officer Training Class. In the same manner the fourth Officer Candidate Class and the fourteenth Officer Training Class will report at school simultaneously.

Under the system now in vogue, therefore, there are four classes in session, a candidate and officer group together forming the upper class and a candidate and officer group forming the lower class. The latest classes average about 70 candidates and 30 officers in number.

Officer candidate classes are drawn from the many thousands of lawyers now in the Army as enlisted men and warrant officers, and it is interesting to note that it was not until March 31, 1943, by Change Number 6 to Army Regulations 625-5, dated November 26, 1942, that such a class was authorized for the Judge Advocate General's Department. Prior to that time officer candidate schools had been authorized for 18 other different branches of the Army.[9]

Under present regulations any enlisted man or warrant officer in active military service with at least four months' service may apply to attend the school, provided that he has reached his twenty-eighth birthday, is a graduate of an accredited law school, and has had at least four years active practice of law.[10] Existing War Department policies limit civilian appointments for duty in the Judge Advocate General's Department to lawyers with outstanding experience and ability in the field of admiralty law and only a very limited number from this highly specialized field will be recommended for appointment.

Applicants are processed by examining boards at posts, camps, and stations, as is done for other officer candidate schools, except that the question of general suitability as officer material only may be considered. Final determination as to technical qualification with appointment as a

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[9]See Army Regulations 625-5, Section 1, paragraph *d*, dated November 26, 1942.

[10]Changes No. 6, AR 625-5, paragraph 33*c* (10), dated March 31, 1943. The regulation reads: "The applicant must have attained his 28th birthday, be a graduate of a law school. At least 4 years practice of law is desirable, but not essential." In administering the Regulation The Judge Advocate General has accepted equivalent bureau and departmental work for the federal and state governments in lieu of individual practice of law.

candidate and ultimate assignment to school of the provisionally accepted candidates is made by The Judge Advocate General. The pertinent Army Regulation provides:[11]

> "The Judge Advocate General will promptly notify each applicant concerning his rejection, acceptance, or selection. If accepted, but not selected, the applicant will be given some indication as to the approximate date he may expect to be selected for a particular class at the Judge Advocate General's Officer Candidate School."

Investigation and evaluation of the professional and other qualifications of each applicant require from two to four weeks after receipt of the application by The Judge Advocate General.

With the expansion of the school and its curriculum, it has been necessary to augment the faculty and staff. At the time of the beginning of the school in February, 1942, in addition to Colonel Young, Commandant (in civilian terms he would be Dean), there were only two regular instructors, both officers of the Judge Advocate General's Department, and as has been noted, the course was only a six weeks "refresher." Now the teaching staff and faculty consists of 16 regular instructors, members of the Judge Advocate General's Department. The term of the course has been extended to 17 weeks both for the officer training courses and for the officer candidate classes. Lectures by distinguished military and civilian authorities are added features of the curriculum.

II.

In addition to the "backbone" course of military justice, the curriculum includes courses in military affairs, claims by and against the government, government contracts, rules of land warfare, taxation, constitutional law, military reservations, legal aspects of military government, as well as others to which less time is devoted. Great stress is placed upon military discipline—military science and tactics include close order drill, interior guard, map reading, chemical warfare, minor tactics, staff functions, signal communications, weapons, and similar subjects designed to prepare students for duty as staff officers.

Military training is necessary for officers of the Judge Advocate General's Department, for, being soldiers first and lawyers second, they must share all the experiences of the unit to which they may be assigned. In battle the military law office is necessarily closed for more pressing matters, since the Staff Judge Advocate may be called upon to perform many kinds of military duties, as, for example, liaison officer to higher or lower echelons.

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[11]See War Department Memorandum No. W 350-80-43, dated April 1, 1943, entitled Judge Advocate General Officer Candidate School, Ann Arbor, Michigan; also, War Department Memorandum No. W 350-72-43, dated March 24, 1943, entitled Establishment of Judge Advocate General Officer Candidate School, Ann Arbor, Michigan.

Under the heading of military affairs, a most comprehensive course, the student deals with the construction of voluminous Army Regulations, and makes a careful study of the content and use of sources of authority, including statutes, Executive Orders of the President, proclamations, the opinions of The Judge Advocate General, and War Department directives. Most problems of military personnel arising from statutes, executive orders, regulations, and other official documents are within the scope of the course.

Officers of the Department are regularly called upon to give legal advice to officers and enlisted men regarding personal affairs[12]: and in order to prepare students for such work, the course in military affairs takes up specific statutes and documents affecting such problems; *e.g.,* The Servicemen's Dependents Allowance Act[13]; The Soldiers and Sailors Civil Relief Act[14] with its most recent amendments thereto known as the Sparkman Act[15]; the series of enactments facilitating the naturalization of aliens serving honorably with the armed forces,[16] and the War Department pamphlet, "Personal Affairs of Military Personnel and their Dependents."[17]

As previously stated, military justice is the backbone of the curriculum. The average judge advocate will have more daily routine contact with this than with any other subject. Consequently a most intensive study is made of the Articles of War and the Manual for Courts-Martial, which together form the basis for the administration of the "criminal law" of the Army.

The Articles of War are statutes enacted by Congress.[18] The Manual, an executive order issued by the President, contains 200 pages with 27 chapters. The volume sets forth the Articles of War as well as helpful forms for military legal papers; it is often referred to as the "bible" of the Judge Advocate, and in the field it is often the only book available.

The course on government contracts teaches the student the present-day wartime basis of contractual relations of the government with private

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[12]See War Department Memorandum No. S 25-2-43, dated May 15, 1943, pertaining to legal advice and assistance for military personnel, where attention is invited to War Department Circular No. 74, 1943, announcing joint sponsorship by the War Department (through The Judge Advocate General) and the American Bar Association of a plan to make legal advice and assistance available to military personnel and their dependents, and providing for the establishment of "legal assistance offices" at Service Command Headquarters and at posts, camps, and stations within the United States.

[13]Public No. 625, c. 443 (June 23, 1942).

[14]54 STAT. 1178, 50 U. S. C. A. § 501.

[15]Public No. 732 (77th Congress).

[16]Sec. 1001, The Act of October 14, 1940; (54 STAT. 1137; 8 U. S. C. 501-907, 1940). See also War Department Bulletin No. 18, dated April 10, 1942, and War Department Circular No. 120, dated April 24, 1942.

[17]War Department Pamphlet, 46 pages, United States Government Printing Office, Washington, D. C., 1942.

[18]41 STAT. 787; 10 U. S. C. A. 1471 (1920); U. S. Const. Art. I, §8.

industry as developed in the all-out war effort. The basic statutory law and the modifications thereto by recent emergency statutes, executive orders, and departmental regulations, including the all-important re-negotiation phase, are dealt with in detail.

The subject of claims covers recent legislation and Army Regulations relating to the prosecution, investigation, processing and payment of claims of civilians and military personnel against the government arising from the operations and activities of the armed forces, both at home and abroad.[19] Claims by the government against individuals are also considered.

III.

The record of the Judge Advocate General's School under the supervision of Colonel Young is a noteworthy one. Its program has been flexible—always capable of change to meet changing conditions—and the school has become recognized as an important addition to the Judge Advocate General's Department. Since the transfer of the school to the University of Michigan in the fall of 1942 the average number of officers graduated in each class has been approximately 55 to 60, and altogether the school has graduated about 700 officers.[20] In addition to the graduates of the regular course, a class of approximately 40 officers was trained during April, 1943, in a special thirty day course in claims for duty as claims officers.

Upon graduation there is a variety of assignments possible. Some officers are directly assigned to overseas duty with combat divisions, claims commissions, or offices in higher headquarters. Others receive further training in the Office of the Judge Advocate General in Washington or in a service command headquarters and are subsequently sent to foreign duty or to a troop unit in this country. Still others are assigned to troop duty with units training in this country or to newly activated divisions as staff judge advocates, or to service command headquarters, Army headquarters, and ports of embarkation, as staff, post, or camp judge advocates, or permanently assigned to the Judge Advocate General's Office in Washington.

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[19]Wyatt, *op. cit.* at 137.

[20]Letter from Colonel Edward H. Young, Commandant, The Judge Advocate General's School, Ann Arbor, Michigan, dated May 5, 1943.

RIGHT OF SURETY UPON DEFAULT OF PRINCIPAL TO CONTRACT PRICE AGAINST RIGHT OF UNITED STATES FOR SOCIAL SECURITY, INCOME AND OTHER TAXES

E. Kemp Cathcart★

This sounds like a new proposition, but it is not much newer than the law of Moses. It sounds new only because of the new forms of taxation by our Federal Government and the resourcefulness of the Federal Government in collecting such taxes.

As a matter of fact, this proposition resolves itself into the question of "Can the Federal Government set off, counter-claim, or recoup the taxes owed by a contractor against the contract price?" The taxes referred to include taxes of every description due to Federal Government by the contractor, such as income taxes, social security taxes, liquor taxes, and many other forms of taxation. Contract price, for the purpose of this article, is the balance due by the United States to a contractor on a construction contract partially or entirely completed either by the contractor, his surety, or by the United States. It includes, in addition to retained percentages, moneys earned and unearned by the contractor in the hands of the United States. Therefore, it is necessary to consider:

I. Set-off, counterclaim, and recoupment.

II. Right of the United States to set off debts other than taxes.

III. The rights of the United States to file a lien for taxes.

IV. Effect of such lien where rights of third parties have arisen.

V. Whether, upon default, a surety which pays the obligation of its contractor is entitled to the contract price or any remaining balance.

I. "Set-off" and "counterclaim" are generally used interchangeably, although by some statutes the term "set-off" implies a right even broader than "counterclaim," because such statutes provide that any counterclaim or demand may be used as a set-off. Usually, however, they are both defined as any claim or demand arising out of debt, duty, or contract existing at the time of the commencement of the action and matured at the time of their offer as a set-off or counterclaim. Recoupment differs from set-off mainly in that the claim must grow out of the very same transaction which furnishes the plaintiff's cause of action, and being in the nature of a claim of right to reduce the amount demanded, can be had only to an extent sufficient to satisfy the plaintiff's claim. In other

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words, recoupment goes to the justice of the plaintiff's claim and no affirmative judgment can be had thereon, while set-off is not necessarily confined to the justice of such particular claim, and an affirmative judgment may be had for any amount to which the defendant establishes his right over and above the amount to which the plaintiff has proved he is entitled.[1]

Although the doctrine of set-off was not recognized at common law, it was so absolutely necessary to the administration of justice that a court of equity could not fail to supply it when the common law omitted it, and long prior to the statute of set-offs, it had been a familiar and favorite principle of courts of chancery to adjust in one suit all conflicting demands between the parties, which were readily capable of such adjustment, where, from the relations and situation of the parties and from the nature of their mutual claims, equity and justice seemed to require a complete and speedy settlement. Consequently the jurisdiction of equity is not based upon any statutes of set-off and would exist without any such statute as it does now, and would not be in any sense affected by the repeal of those statutes.[2]

II. A fundamental distinction exists between debts and taxes. There are two very distinct meanings. A debt is not a tax, and a tax is not a debt. Debts are due to the Government in its corporate capacity. Taxes are due it in its sovereign capacity. A debt is a sum of money due upon a contract, expressed or implied, or one which is evidenced by a judgment. Taxes are imposts levied by the government for its support or for some special purpose which the Government has recognized.[3]

For debts due it, the Government would have no greater right to use the same as set-off or to priority of payment than general creditors unless such rights were granted by statute.[4]

31 U. S. C. A. § 71, provides all claims and demands whatever by the Government or against it, and all accounts whatever in which the Government is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

31 U. S. C. A. § 227, provides when *any final judgment* recovered against the United States shall be presented to the Comptroller General and the plaintiff therein shall be indebted to the United States in any manner, it shall be the duty of the Comptroller General to withhold pay-

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[1]24 R. C. L. 794, 5; Notes (1937) 106 A. L. R. 1241, 1242.
[2]24 R. C. L. 803.
[3]Liberty Mutual Ins. Co. v. Johnson Shipyard Corp., 6 F. (2d) 753, 755 (C. C. A. 2nd, 1925).
[4]United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. ed. 638 (1922); United States v. Bank of North Carolina, 6 Peters 29, 2 L. ed. 308 (U. S. 1831); United States v. Fisher, 2 Cranch 358, 2 L. ed. 304 (U. S. 1830).

ment of any amount of such judgment equal to the debt thus due to the United States.

31 U. S. C. A. § 191, provides whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied. Insolvency here referred to is that contemplated by the Bankruptcy Laws.

III. The only right of our Government to file liens for taxes is that given by Congress.

26 U. S. C. A. § 3670, provides if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U. S. C. A. § 3671, provides unless any date is definitely fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

26 U. S. C. A. § 3672, provides such lien shall not be valid as against any mortgage, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector as follows:

1. In accordance with the law of the State or Territory in which the property subject to the lien is situated.

2. In the office of the Clerk of the United States District Court for the Judicial District in which the property subject to the lien is situated whenever the State or Territory has not by law provided for the filing of such notice.

3. In the office of the Clerk of the District Court of the United States for the District of Columbia if the property subject to the lien is situated in the District of Columbia.

IV. I would apply the principal of first in time, first in right, to the fourth proposition. Any lien established by third parties before the Government complies with the Acts of Congress granting it the right to a lien will take priority over any lien subsequently perfected by the Government by following the procedure set forth in such Act or Acts, and this, of course, includes any valid lien secured by the surety by the terms of the application of its principal, the contractor. Conversely, any lien perfected by a third party after the Government has perfected its lien will follow that of the Government.[5]

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[5]*In re* Allied Products Co., 134 F. (2d) 725 (C. C. A. 7th, 1943); United States

Yet, like most every other rule or principle, there must be an exception, and when the third party is a laborer or materialman, the doctrine of equitable lien of such laborer or materialman would be the exception in this case.

Independently of statute, where labor and materialmen have no adequate remedy at law, such unpaid labor and materialmen have been held to have a superior right or equitable priority in and to the unpaid portion of the contract price, which, if not a lien in the strict and proper sense, brought kindred consequences along with it.[6]

This right might arise by express contract or by statute or upon general principles of equity. Recognition of the moral or ethical duty resting upon the Government led to the passage of the Heard Act of 1894.[7] It may have been the congressional intent of such Act to give labor and materialmen by the statutory bond an additional protection, which would be the ordinary and primary source of payment in cases where the person with whom such claimants contracted failed to pay their debts for labor and material, and that Congress did not intend to diminish the obligation of the Government to see that such claims were paid so far as such a result might be accomplished by the use of the unpaid portion of the contract price, and that labor and materialmen, in addition to their rights under the bond, had an original and continuing equitable priority in the fund which could be enforced in an appropriate case, either directly or by subrogation.[8]

V. Right of subrogation governs the fifth proposition of "whether upon default the surety which pays the obligation of its contractor is entitled to the contract price or any remaining balance." Under its contract, the contractor has the obligation to complete and to pay for labor and material. If the contractor fails or defaults in these obligations, then the Government or owner has the right to the contract price or the remaining unpaid portion to be used to fulfil the terms of the contract. If the Government or the owner would require the surety to complete the contract and pay the unpaid labor and material claims and the surety would elect to complete the contract and pay such claims, then, of course, it would be entitled, by way of subrogation, to the contract price or the unpaid balance to the extent that

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v. City of Greenville, 118 F. (2d) 963, 966 (C. C. A. 4th, 1941); Barr, Jr. et al v. Barr's Rent-A-Car Co., 71 Ohio App. 465 (1942).

[6]American Surety Co. v. Westinghouse Electric and Mfg. Co., 296 U. S. 133, 56 S. Ct. 9, 80 L. ed. 105 (1935); Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. ed. 547 (1907); *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943).

[7]28 STAT. 278, 40 U. S. C. A. § 270 (1894).

[8]Martin v. Nat. Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. ed. 822 (1936); Belknap Hardware and Mfg. Co. v. Ohio River Contract Co., 271 Fed. 144 (C. C. A. 6th, 1921).

such price or balance is necessary to cover the completion cost and to pay labor and material bills.[9] It is clear if the contractor failed to complete the contract or failed to pay his labor and material bills, he would not be entitled to the contract price nor any unpaid portion unless such balance was in excess of the cost of completion and the amount necessary to pay all labor and material bills;[10] therefore, such price or unpaid portion would not constitute an asset of the contractor[11] and consequently would not be subject to lien for debts due by such contractor, whereas the contract price or unpaid portion would represent funds in the hands of the Government or owner to complete the contract and to pay the labor and material bills, to which the surety would be subrogated if, as, and when it sustained a loss, either in completion of the contract or the payment of labor and material bills,[12] or both.

It may be well to add that if the Government should pay the contract price or any unpaid portion before the payment of labor or material bills, and the surety is subsequently compelled to pay such bills, the surety would not have a claim against the Government and might not have a claim against any third party receiving the balance for its failure to see that such bills were paid before releasing the contract balance.[13] Therefore, the surety should be alert to see that the Government is prevented by proper legal action from paying such contract balance. If the contractor failed to finish the contract, the action on the part of the Government in releasing the contract balance before the contract was completed would have the effect of releasing the surety, and if not in whole, then certain pro tanto.[14]

The Government's argument, when asserting claim for set-off against the contract price or any unpaid balance thereof is as follows:

A. That the Government, when any person indebted to it is insolvent, is entitled to priority.

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[9]Prairie State Nat. Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. ed. 412 (1896).

[10]Martin v. Nat. Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. ed. 822 (1936); McGraw & Co. v. Sherman, U. S. D. C., Conn., April 10, 1943.

[11]*In re* L. H. Duncan, 127 F. (2d) 640 (C. C. A. 3rd, 1942); American Surety v. Finletter, 274 Fed. 152, 153 (C. C. A. 3rd, 1921); Montgomery v. Philadelphia, 253 Fed. 473 (E. D. Pa. 1918).

[12]Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. ed. 547 (1907); Prairie State Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. ed. 412 (1896).

[13]California Bank v. United States Fidelity & Guaranty Co., 129 F. (2d) 751 (C. C. A. 1942).

[14]Southern Pacific v. Globe Indemnity Co., 21 F. (2d) 288 (C. C. A. 2nd, 1927); O'Neil v. Title Guarantee & Trust Co., 191 Fed. 570 (C. C. A. 6th, 1911); Fidelity & Deposit Co. v. Agnew, 152 Fed. 955 (C. C. A. 3rd, 1906); Philips v. American Liability & Surety Co., 162 Atl. 435 (1932); Corp. of Church of Jesus Christ v. Hartford Accident & Indemnity Co., 95 P. (2d) 736 (Utah 1939).

B. That the Government is entitled to lien for taxes.

C. That the right to make a set-off is one of the inherent rights of the General Accounting Office in making settlements.

Argument A refers to priority given to claims of the United States in cases where the debtor or his estate is insolvent. This priority was given by statute.[15] This section does not create a lien in favor of the Government, but merely provides for priority of the United States over general creditors of an insolvent debtor. If a third party has a valid lien against the assets of a solvent debtor, the claim of the United States would not take priority over such claim in spite of this statute. If the contractor failed to complete the contract or pay his bills for labor and material, the contract price or the unpaid portion would not be due to him, and consequently would form no part of the insolvent estate, and the Government could have neither a lien nor a preferred claim against such contract price or unpaid balance.[16]

The Government's argument B is based on an Act of Congress,[17] but to have priority the lien provided for by such Act must be perfected by the Government before any valid lien obtained by the surety under the terms of its principal's application for the surety bond,[18] and even if perfected, such lien of the Government would be subordinate to the equitable lien of a laborer or materialman and to the subrogation right of the surety in event of failure by the contractor to complete the contract or pay bills for labor and material, and the surety, as a result of such failure, completes the contract and pays the labor and material bills.[19] Because of such failure by the contractor to complete the contract or pay bills for labor and material, the unpaid portion of the contract price would not be due him and would not form a part of his assets to which a lien could attach.

The Government's argument or contention, which I have designated as "C," that is, "the right to make a set-off is one of the inherent rights of the General Accounting Office in making settlements" is based on the authority given to the General Accounting Office by Congress,[20]

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[15] 1 STAT. 515, 31 U. S. C. A. § 191 (1799).

[16] Martin v. Nat. Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. ed. 822 (1936); Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. ed. 547 (1907); McGraw & Co. v. Sherman, U. S. D. C., Conn., April 10, 1943; *In re* L. H. Duncan, 127 F. (2d) 640 (C. C. A. 3rd, 1942); American Surety Co. v. Finletter, 274 Fed. 153 (C. C. A. 3rd, 1921); *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943); Board of Education v. Vail, 154 Atl. 531 (1931).

[17] 53 STAT. 448, 26 U. S. C. A. § 3670-3672 (1928).

[18] *In re* Allied Products Co., 134 F. (2d) 725 (C. C. A. 6th, 1943).

[19] McGraw & Co. v. Sherman, U. S. D. C. Conn., April 10, 1943; *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943).

[20] 42 STAT. 24, 31 U. S. C. A. § 71 (1921); 18 STAT. 481, 31 U. S. C. A. § 227 (1875).

but this authority given to the General Accounting Office by Congress does not permit it to ignore the rights of third parties nor the surety in claiming a set-off,[21] and any claims by the Government, whether for taxes or other indebtedness of the Contractor not growing out of the cost of completing the contract bonded or the payment of labor and material bills, would not be prior to the claim of the surety for any loss it incurred in completing the contract or paying of the labor and material bills.[22]

Whereas, the position of the surety is as follows:

(a) If at the time of the execution of its surety bond, the application for such bond contains such terms and conditions as to give the surety a lien and the surety has obtained such lien on the contract price or any unpaid portion by way of assignment or otherwise, then, unless the Government had perfected its lien prior to such time, the surety's lien would be prior to that of the Government.[23]

(b) If by reason of the obligation under its surety bond, the surety was compelled to pay the labor and material bills, it then would be subrogated to the equitable lien of such labor and materialmen, and the equitable duty of the Government to see that they were paid, and would be entitled to the extent of the amount of such bills for material and labor to the contract price or any unpaid portion regardless of whether or not the Government perfected its lien.[24]

(c) If the contractor failed to complete his contract and the surety was obligated to complete the contract under the terms of its surety bond and did complete the contract, then the surety would be subrogated to the right of the United States to the contract price or unpaid portion to make itself whole for the cost of completing such contract.[25]

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[21]Gray v. School District, 67 F. (2d) 141 (C. C. A. 3rd, 1943); United States Fidelity & Guaranty Co. v. United State, 92 Ct. Cl. 144 (1942); American Radiator v. Modern Utilities, 164 Atl. 925 (1933).

[22]Henningsen v. United States Fidelity & Guaranty, 208 U. S. 404 28 S. Ct. 389, 52 L. ed. 547 (1907); *In re* Van Winkle, 29 F. Supp. 711 (W. D. Ky. 1943).

[23]*In re* Allied Products Co., 134 F. (2d) 725 (C. C. A. 6th, 1943); Barr, Jr. et al v. Barr's Rent-A-Car Co., 71 Ohio App. 465 (1942).

[24]Martin v. Nat. Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. ed. 822 (1936); Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. ed. 547 (1907); McGraw & Co. v. Sherman Plastering Co., U. S. D. C. Conn., April 10, 1943; *In re* L. H. Duncan, 127 F. (2d) 640 (C. C. A. 3rd, 1942); Morgenthau v. Fidelity & Deposit Co. of Md., 94 F. (2d) 632 (App. D. C. 1937); American Surety Co. v. Westinghouse Electric Mfg. Co., 75 F. (2d) 377 (C. C. A. 5th, 1935); Farmers' Bank v. Hayes, 58 F. (2d) 34 (C. C. A. 6th, 1932); United States Fidelity & Guaranty Co. v. United States, 92 Ct. Cl. 144 (1942); *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943).

[25]Prairie State Nat. Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. ed. 412 (1896); United States Fidelity & Guaranty Co. v. United States, 92 Ct. Cl. 144 (1942).

While the Government has a lien for unpaid taxes against the contract price or any unpaid balance, it is the writer's opinion that even if it has perfected such lien by following the statutes, such lien is not prior to the claim of the surety if the surety has secured a valid lien under the terms of the application of the contractor to it for the surety bond prior to the time the Government has perfected its lien for taxes, or if a default has occurred under the contract either on account of non-completion or non-payment of labor or material claims, in which latter event the surety would be subrogated to the equitable lien of labor and materialmen as well as the right of the Government to use such balance to complete the contract. To stress this point, I again repeat that if a default occurs under the contract, the unpaid portion of the contract price would not be due the contractor, consequently would not form a part of the contractor's assets and would not be payable to the contractor, but would be available to the Government, owner, or to surety by right of subrogation *to cure such default.*

WHY NOT A STRUCK JURY?

Julian C. Wilson★

There is a better method of selecting juries in vogue, in some of the States, than is used in the State of Mississippi. It is better, being fairer and, it is believed, in the main more economical. I refer to the method of selection known as having "struck juries," rather than having the challenges exercised, one at a time.

It is the method used—up to a certain point—by Judge Stennis, in the Circuit Court of Lowndes County in the case of *Smith v. State.*[1] The Judge followed the system used in struck juries up to a certain point and then had to abandon it, by reason of the limitations imposed by the Code with reference to peremptory challenges. The Supreme Court held that the method, as there used, did not constitute reversible error. The full benefit of the system, however, was not realized because of the requirements[2] of the Code with reference to the method of exercising challenges, which, of course, would have to be amended in the event a "struck jury" system was fully adopted.

The legislation in Mississippi has usually been progressive in improving the methods of practice. It is therefore somewhat strange that the Bar and Legislature of that State never seem to give any consideration to the system of struck juries. This method of selecting juries is used in varying ways and methods in a number of States.[3]

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[1]190 Miss. 24, 198 So. 562 (1940).

[2]Miss. Code Ann. (1930) § 2029.

[3]The writer has observed its use in the states of Wisconsin, Missouri and Arkansas. This method is used only in civil cases in Arkansas.

In the Mississippi courts in civil cases each side has four peremptory challenges, which means that a jury must be selected out of a possible twenty qualified persons.[4] In the ordinary criminal cases each side has six challenges, so the selection must be made from a possible twenty-four qualified persons.[5] In capital cases, each side has twelve challenges, which might thus require thirty-six qualified persons for ultimate jury selection.[6]

These challenges are only exercised after a jury pronounced fit to serve is tendered to the parties from which to select. The method in use is that the Judge, with the aid of attorneys, qualifies the jurors and presents a panel of twelve to the State or plaintiff, and that party exercises his or their four, six or twelve challenges, and then the number is replaced, one by one, from the talesmen or bystanders when a panel is selected and tendered to the other party. That party in turn challenges those desired up to the limit, and then in turn, one by one, prospective jurors are qualified, passed upon by the plaintiff's side, and again tendered to the defendant and they go through the same process.

Much unnecessary time is consumed in these qualifications in succession, one by one, and to it is added the uncertainty and gambling hazard of deciding whether to accept the jurors already tendered or risk the unknown ones who are to come. The struck jury system in use in a number of States works more simply and is ultimately less expensive because it saves the time of an expensively conducted court.

Under a struck jury system, in a civil case the judge, with the aid of attorneys, would select and present to the plaintiff, not twelve but twenty qualified jurors. The plaintiff under such system would be required to strike off four. A qualified sixteen jurors would be then presented to the defendant, who must strike off four, leaving a jury of twelve selected in a much shorter time with the advantage to each party that when he exercises his challenges he knows who will come because he knows those who remain in the box. Each party would so make a choice among those already qualified and that would end the jury selection.

In the usual criminal case, the Judge in the same way would present to the State's side, not twelve but twenty-four already qualified jurors. The State would strike off six and with no further time lost in questioning other talesmen or bystanders, the defendant would strike off the remaining over-plus of six, and there would be left a jury of twelve.

So, in capital cases the Judge would qualify thirty-six jurors after giving each party full opportunity to examine as to the qualifications.

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[4] Miss. Code Ann. (1930) § 581.
[5] Miss. Code Ann. (1930) § 1277.
[6] *Ibid.*

The State must strike off twelve and then twenty-four would be presented to the defendant, who must strike off twelve. It would then leave remaining the twelve jurors who would try the case.

Under this system no right to challenge would be cut down. Each party would have the same rights he has now, and the peremptory challenges, instead of being blindly made, would be exercised with the additional knowledge of who the jurors will be to take the place of those set aside.

Not only does it reduce such a hazard, but it would greatly impair the opportunity of a partisan sheriff to favor one side or the other in the ultimate selection of the jury. Every lawyer of experience in the State has been confronted, in the exercise of his peremptory challenges, with the problem of those brought in to succeed the challenged talesmen and has had a new juror brought in and qualified whom he believed to be, and who turned out to be, worse for him than the juror challenged. Sometimes it happens by chance, sometimes it happens at the hands of an unfriendly sheriff or deputy. It is unnecessary that it should happen at all.

More caution would need to be exercised by the judge and more initiative and skill by the attorney in seeing that the jurors were properly qualified before they were finally presented than happens now, but that would only make for the selection of a fairer jury and could not affect the benefits obtained by the selection from those who would serve rather than the selection without knowing who would finally serve.

Such a system would not require a great many more jurors, except in capital cases. The additional expense would very likely be obviated by the saving of the time of the entire court in the qualification of those placed on the jury all at one time, rather than having these examinations drawn out by the examination of one or several prospective jurors at a time.

In the Chancery Court now twenty talesmen are drawn.[7] In the County Court twenty to forty are drawn,[8] and in the Circuit Court thirty are drawn for ordinary petit juries,[9] two juries being regularly impanelled. Thirty talesmen in the Circuit Court would ordinarily provide for a struck jury, if they all qualified, and instead of jury number one being asked to take the box in a civil or felony case, both juries would be placed in the box and from the excess those over twelve would be struck first by the plaintiff's or State's side and then by the defendant's side.

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[7]Miss. Code Ann. (1930) § 364.
[8]Miss. Code Ann. (1930) § 703.
[9]Miss. Code Ann. (1930) § 2058.

Special venires in capital cases under the present law require forty or more talesmen. The struck jury system would not prevent nor materially change the use and drawing of special venires, but would more likely facilitate them. It would necessitate, however, a larger venire for it, probably requiring fifty veniremen in a capital case. As each side in a capital case has twelve challenges, thirty-six qualified jurors would necessarily be presented to the State and when the State had struck twelve, twenty-four would be presented to the defendant, from which he would strike twelve. It will thus be seen that larger special venires than are now used might be required, but they are required only rarely, and a wise judge would exercise much judgment, according to the notoriety and public feeling in the case, in determining the number of veniremen that would be needed.

Thus in both criminal and civil cases this method of selection seems to be fairer to each party in affording each side the information as to what will happen when that side exercises its challenge. Such a system is probably more economical in saving the time usually lost in individually examining the additional talesmen for jury qualifications and service.

Simple changes would necessarily be made in the statute providing for the drawing and selection of jurors, in order to provide the necessary number for each court. More discretion should be given and should be exercised by the trial judges with reference to the drawing of jurors for each term. An efficient judge would likely inquire into the state of the docket before the juries were drawn at each term of court, find out the number of criminal and civil cases and those likely to furnish contests. He should set his criminal and civil cases as nearly as possible at separate times, providing greater jury facilities to the important criminal cases. Also he should set his docket with a view to separating the time of hearing cases requiring, and those not requiring, juries. Fewer jurors would need be provided at those terms and times when there were no contests and no criminal trials. The system would be especially valuable in those countries which have separate times for the trial of civil cases and criminal cases and jury cases and non-jury cases. The judge could thus keep down the expense of unnecessary jurors, but have a sufficient number on hand when jury cases were on trial to make the selections from qualified jurors all at once.

This system of selecting jurors seems to be peculiarly applicable to the State of Mississippi, where most of the courts have only two week terms and where, therefore, the expense of juries is small. There, ordinarily, two regular juries with four talesmen would afford ample opportunity for the use of this struck jury system. No change in the basic rights or the basic remedies of either party would occur from its use, the real difference being that, instead of the challenges being exercised one, two or four at a time, they would be exercised by each party all at

the same time by removing from the jury those surplus talesmen which the two sides did not want.

In some States, two additional jurors are qualified to hear each case just as the selected jurors, so that, if any juror becomes sick or otherwise incompetent, one of those already sworn, who has heard the trial, may take his place and allow the trial to proceed. It is a wise enough precaution, but in the writer's experience, although the loss of a juror has often been threatened by sickness, it has seldom, if ever, proceeded to the point where the trial had to be discontinued on that account.

Mississippi judges would undoubtedly learn to use this struck-jury system with ease and facility, and to so handle it as to provide a saving in jury expense rather than permit it to become more expensive. The principal cost of holding trial courts in a State is the cost of the attendance of witnesses and jurors. In the main, the cost of the time of the court in witness and juror attendance lost in qualifying talesmen to take the place of challenged jurors would quite make up for the cost of any additional talesmen to provide for the struck jury methods.

The State Bar Association, if interested, should have its proper committee look into the workings of this system, and when such committee has become assured that it will work small or no additional expense and would provide a fairer and better method of jury selection, recommend it for legislation. The State Legislature has rarely failed to heed strong recommendations of the State Bar Association in matters of procedure and practice.

COMMON LAW MARRIAGE IN MISSISSIPPI

Larry A. Pacific★

I. INTRODUCTION

Marriage is more than a mere contract concerning only the immediate parties but, once entered into, becomes a status in which the community has an important interest.[1] To safeguard the interest of the community and to preserve and perpetuate our civilization the state, from the very earliest times, has regulated the marriage contract and the relationship which emanates from its execution. In this the need for public regulation, there is a common understanding among all the so-called civilized countries of the world; we differ only in the requisites and the formalities necessary.

In England, prior to the Marriage Act of 1753,[2] there is no doubt

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[1] 1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) 3.

[2] 26 *Geo.* II. c. 33.

that informal[3] or common law marriages were valid.[4] The case of *Regina v. Millis*,[5] decided in 1884 by the House of Lords and holding that common law marriages were not valid prior to the act in question, has been found to be historically incorrect by all the authorities on the subject.[6]

When the colonists came to these shores, they brought with them the common law of England. The conditions which existed in the new frontier country, but sparsely populated, created difficulties for the observance of all the formalities of a formal marriage.[7] These conditions needed little impetus from the writings of such eminent authorities as Kent[8] and Greenleaf[9] to give fresh vitality to the common law marriage on this continent. So that, today, we find this anomalous situation: In England, where the informal marriage first grew up in ecclesiastical law, such marriages have long since been made invalid by legislative act, while in the United States, common law marriages are recognized in approximately half the states and territories.[10] It would thus appear that the necessity for formal marriages depends upon the conditions existing within the state and would, consequently, be determined by public policy.

At common law there were two methods of entering into a valid informal marriage. Kent states that the contract of marriage may be made either *per verba de praesenti,* or *per verba de futuro* followed by consummation and this will constitute a valid common law marriage in the absence of any impediments. This, he continues, is the doctrine of the common law and also of the canon law, which governed marriage prior to the act of 1753 in England.[11] That nothing more was required than the agreement of marriage was illustrated by the doctrine, *Consensus non concubitus, facit matrimonium* (consent, not cohabitation, makes marriage), and Bishop states the rule thus: "Hence, when parties, capable

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[3]The term *informal marriage* is said to be the proper one but, since the term *common law marriage* is the term most commonly used, both terms may be used synomously.

[4]KEOGEL, COMMON LAW MARRIAGE (1922) 42-45.

[5]10 Cl. & F. 534, 8 Eng. Rep. 844 (H. L. 1884).

[6]*See* KEOGEL, COMMON LAW MARRIAGE (1922) 45; 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 26.

[7]For conditions that made for growth of common law marriage in this country, see *The Passing of Common Law Marriage* (1941) 15 TEMP. L. Q. 541, 544; Hall, *Common Law Marriage in New York* (1930) 30 COL. L. REV. 1, 2-4. (As late as 1930 there were no marriage statutes in New York State.)

[8]2 KENT, COMMENTARIES (11th ed. 1867) 39-63. *But see,* Hall, *Common Law Marriage in New York* (1930) 30 COL. L. REV. 1, where it is shown that Kent was clearly in favor of statutory action for the abrogation of the common law marriage.

[9]2 GREENLEAF, EVIDENCE (10th ed. 1868) 416-22.

[10]*See* VERNIER, AMERICAN FAMILY LAWS (1931) 106-108, where a tabular analysis is presented which includes the studies of several authorities on the subject.

[11]2 KENT, COMMENTARIES (11th ed. 1867) § 86.

of intermarrying, agree to present marriage, the matrimonial relation is made thereby complete."[12]

In reference to marriage contracted *per verba de futuro,* it need only be said that there are no American decisions on the doctrine[13] and it may be taken, therefore, that this method of contracting an informal marriage has long since become obsolete.[14] The courts have consistently and patiently shunned a decision on the doctrine itself.[15] Eliminating those marriages contracted *per verba de futuro cum copula* at common law, we have therefore narrowed the problem down to those marriages contracted *per verba de praesenti,* which alone are recognized in the United States today. Many of the states which do recognize the common law marriage, however, have added the need of cohabitation to follow the present agreement to accomplish the marriage status via the common law route.[16] Mississippi is one of these states.

II. *Historical Development of Common Law Marriage in Mississippi*

The history of common law marriage in Mississippi is divided into three periods: (1) that prior to the Code of 1892 when common law marriages were recognized, (2) that after the adoption of the Code of 1892 and prior to the adoption of the Code of 1906 when common law marriages were found to be invalid by statute, and (3) the period after the adoption of the Code of 1906 to the present when common law marriages are again recognized.

(1) In 1856 the Supreme Court in *Hargroves v. Thompson*[17] adopted the accepted rule for the construction of marriage statutes. A legal marriage between the parties was denied because the clerk who issued the license had no authority and intestate was a minor, under eighteen years of age and without the consent of either parent or guardian as required by statute, at the time of the alleged marriage. It was admitted that at common law the marriage would have been good. It was argued, however, that the rule had been changed by statute and it would have to be understood that the legislature intended that no marriage be valid unless

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[12]1 Bishop, Marriage and Divorce (4th ed. 1864) § 228.

[13]Madden, Domestic Relations (1931) 58.

[14]*See,* Hulett v. Carey, 66 Minn. 327, 69 N. W. 31 (1896) where by way of dictum the court said that marriages *per verba de futuro cum copula* are valid in the absence of civil regulations to the contrary.

[15]Note the manner in which the Mississippi Supreme Court ignored the appellant's defense, in suit for support, on the ground that "these parties cohabited in contemplation, that is because of their mutual agreement to enter into marriage relations at an early date, which under the laws of Mississippi and practically every other state does not constitute common law marriage" in Jourdan v. Jourdan, 181 Miss. 176, 177, 179 So. 268 (1938).

[16]Keogel, Common Law Marriage (1922) 164, 165, for tabular analysis.

[17]31 Miss. 211 (1856).

solemnized in the manner prescribed. The court cited Kent[18] and Greenleaf[19] with approval and held that the marriage was good at common law although it was not conducted in conformity to the manner prescribed by statute, the parties being capable to contract at common law. It was said that marriage statutes are merely directive and not mandatory in their scope in the absence of prohibitory words in the statute that marriages not conducted in conformity with the manner prescribed shall be void.

With the adoption of the Constitution of 1869 the validity of the common law marriage was declared by the court to have been written into the fundamental law of the state in the following provision:

> "All persons who have not been married, but are living together, cohabiting as husband and wife, shall be taken and held for all purposes in law as married, and their children, whether born before or after the ratification of this Constitution, shall be legitimate; and the legislature may, by law, punish adultry and concubinage."[20]

(2) When the provision of the Constitution of 1869 relative to common law marriage was left out of the Constitution of 1890, the legislature thereafter passed the following act affecting the contract of marriage within the State of Mississippi embodied in the Code of 1892:

> "Marriage shall not be contracted or solemnized unless a license shall first have been duly issued, and such license shall be essential to the validity of a marriage."[21]

The Supreme Court did not expressly hold this section either directory or mandatory until it rendered the decision of *Olivari v. Clark*[22] in 1936. However, the court had previously indicated that the statute was to be taken as mandatory in character.[23] Later the court ruled directly on the problem, saying:

> ". . . section 2864, Ann. Code of 1892, prohibited the contracting of any marriage, ceremonial or common law, unless preceded by the issuance of a license therefore, and expressly declared that 'such license shall be essential to the validity of a marriage,' or, in other words, that any marriage contracted or solemnized without a license therefore shall be void. I do not think that the statute will admit of any other construction."[24]

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[18]2 KENT, COMMENTARIES (11th ed. 1867) 90, 91; Hall, *Common Law Marriage in New York* (1930) 30 COL. L. REV. 1, 8-10.

[19]2 GREENLEAF, EVIDENCE (10th ed. 1868) § 460.

[20]MISS. CONST. (1869) Art. 12, § 22.

[21]MISS. CODE ANN. (1892) § 2864.

[22]175 Miss. 883, 168 So. 465 (1936).

[23]Blanks v. Southern Ry., 82 Miss. 703, 33 So. 570 (1903); Howard v. Kelly, 111 Miss. 285, 71 So. 391 (1916); Sims v. Sims, 122 Miss. 745, 85 So. 73 (1920).

[24]Olivari v. Clark, 175 Miss. 883, 895-96, 168 So. 465, 468 (1936).

(3) The Code of 1906[25] again restored the common law marriage in Mississippi. The relevant section contains the identical wording of section 2864, Code of 1892, with the following appended:

> "But no irregularity in the issuance of or omission in the license shall invalidate any marriage that is good at common law."

In *Sims v. Sims*,[26] the leading case, the court was evenly divided on the construction of this statute but under the maxim, *Semper praesumitur pro negante,* the decree of the lower court was affirmed and a common law marriage was found between the parties to the suit. Interpreting the statute, the court said:

> ". . . if the two methods therein dealt with by which the bonds of matrimony may be entered into are kept in mind the seeming conflict will disappear. The first of these methods is a ceremonial marriage solemnized pursuant to a license obtained therefor, which marriage will be valid and binding, although not followed by cohabitation. The second is that prescribed by the common law, which is an agreement between a man and woman to then and there become husband and wife followed by cohabitation."[27]

This interpretation placed upon section 3249, Code of 1906, was said to have received legislative sanction when brought forward in the present code of 1930, section 2363, which provided for the granting of a marriage license and ends with this language:

> "The failure to comply with the provisions of this section shall not effect the validity of any marriage duly solemnized, followed by cohabitation, nor the validity of common law marriages as heretofore recognized in this state."

So that, when the Supreme Court was asked to construe this section in *Sykes v. Sykes*[28] and to overrule the *Sims* case, the court refused to do so and held that common law marriages are valid under the law of Mississippi. Several cases subsequent to this one have put the question at rest.[29]

III. *Capacity of Parties to Marry*

Because marriage is effected only by means of contract, there are certain limitations imposed upon the power of the individual to contract toward this status. Some of the limitations may be waived by the par-

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[25]Miss Code (1906) § 3249; Miss. Code Ann. (Hemingway, 1917) § 2556.
[26]122 Miss. 745, 85 So. 73 (1920).
[27]*Id.* at 754, 55, 85 So. at 74.
[28]162 Miss. 487, 138 So. 853 (1932).
[29]The following cases decided after Sykes v. Sykes are in agreement: Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936); Jourdan v. Jourdan, 181 Miss. 176, 179 So. 268 (1937); D'Antonio v. State, 187 Miss. 648, 191 So. 281 (1939); Walker v. Matthews, 191 Miss. 489, 3 So. (2d) 82 (1941).

ties, while others cannot; and this is the difference between marriages which are voidable and those which are void.[30] Practically the same limitations are encountered in the capacity to contract marriage via the common law route as are encountered in contracting a ceremonial marriage, with but few exceptions.

In some instances the law imposes limitations upon the person which are absolute. This is so where the marriage would be distinctly opposed and repugnant not only to our sense of morals but also contrary to public policy as declared by statute.[31] Of such a nature are those attempted marriages between two persons either or both of whom are already married with spouse or spouses living and undivorced;[32] so, also, are those marriages between a white person and a negro or a mulatto person with a degree of one-eighth negro blood or more, and between a white person and a Mongolian with a degree of one-eighth Mongolian blood or more;[33] and, finally, those marriages within the degree of affinity which are declared by statute to be unlawful and incestuous.[34]

In other instances the law does not impose an absolute limitation upon the person but the incapacity arises from the power of the individual to consent, or to withhold consent, at the time the marriage took place. Since, therefore, the consent to the marriage contract must be voluntary, if it is not, the marriage may be either avoided or ratified when the disability is removed or the disability may be waived entirely at the election of the injured party.

The only real difference in the limitations encountered in the capacity to contract marriage via common law and the limitations encountered in contracting a ceremonial marriage is that of age. This difference is slight.

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[30] 1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) 121. For a revealing review of the common law of England and the United States on the nullity of marriages which shows that this is determined by public policy, either through legislation or by decisions of the courts, see Fessenden, *Nullity of Marriage* (1899) 13 HARV. L. REV. 110.

[31] AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) § 35.

[32] MISS. CODE ANN. (1930) § 795 provides for the punishment of the crime of bigamy and section 1414 permits a "divorce" to the "injured party" when there is a marriage to some other person at the time of the pretended marriage between the parties. But the nullity of the marriage from the beginning and the illegitimacy of the children are declared by section 1422. Note, however, section 796, where the presumption of the validity of the marriage is provided when the spouse has been absent for seven successive years and is not known within that time to be alive; or, when the spouse has been continuously absent from the United States for a period of seven years and the interpretation of this statute by the court recently in the case of Frank v. Frank, 10 So. (2d) 839 (Miss. 1942).

[33] MISS. CODE ANN. (1930) § 2361.

[34] MISS. CODE ANN. (1930) §§ 2359, 2360 (within what degree of relationship an attempted marriage shall be incestuous); § 1004 (punishment of an attempted evasion); § 1422 (decree of divorce "shall not render illegitimate the children begotten between the parties during lawful marriage.") But note AMIS, DIVORCE AND SEPARA-

The Supreme Court of Mississippi in interpreting section 2362, Code of 1930, which concerns the age at which a marriage license shall issue to parties seeking marriage, stated that the statute does not raise the common law age for consent to marry but "only authorizes their parents or guardian to object to the issuance of a license for the marriage"[35] where the parties are under 18 and 21 years of age.

At common law insanity at the time of the marriage made the marriage void.[36] Through statutory change such a marriage is now merely voidable.[37] Duress, coercion[38] and fraud[39] present at the time of entering the marriage will create a voidable marriage. So, also, will the impotence of either party to the marriage contract result in a voidable marriage.[40]

IV. *Cohabitation, a Necessary Element*

It has been seen that cohabitation was not a necessary element to create a common law marriage. The maxim was, *Consensus non concubitus, facit matrimonium.* This was the maxim of the "civil law, equally also of the ecclesiastical, of the common, indeed of all law."[41] Several states have wandered from the old maxim and either through judicial interpretation, or statute, have made cohabitation an essential element of a common law marriage.[42] How, then, has the old maxim been cor-

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TION IN MISSISSIPPI (1935) § 62, where it is forcefully argued that incestuous marriages are void and consequently the children are illegitimate.

For a particularly interesting and revealing criticism of the present statutory state of annulment and divorce in Mississippi and proposed statutory changes see Note (1940) 12 MISS. L. J. 464.

For a good historical background of incapacity because of affinity and present attitude toward affinity and miscegination, see Swindlehurst, *"Impediments" to Marriage* (1917) 51 AM. LAW REV. 325.

[35]Hunt v. Hunt, 172 Miss. 732, 743, 161 So. 119, 122 (1935).

[36]Ward v. Dulaney, 23 Miss. 410 (1852); Wilson v. Wilson, 104 Miss. 347, 51 So. 453 (1913); MADDEN, DOMESTIC RELATIONS (1931) § 12; 1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) § 125.

[37]See MISS. CODE ANN. (1930) § 1414, 1422.

[38]The amount of duress or coercion which is said to be necessary is such as to destroy the free agency of the party and compel consent against his or her will and must be active and operative at the time of the marriage. Main v. Main, 113 Miss. 165, 173, 74 So. 138, 141 (1916). For the application of the test, see Marsh v. Whittington, 88 Miss. 400, 40 So. 326 (1906); Rogers v. Rogers, 151 Miss. 644, 118 So. 119 (1928); Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768 (1935). But that such a marriage may be ratified by long delay or acquiescence or that one may be estopped to deny the validity of the marriage especially where children are involved, see Main v. Main, *supra.* A marriage cannot be attacked for duress or fraud after the death of either party, Erwin v. Bass, 172 Miss. 332, 164 So. 568 (1936).

[39]Fraud vitiates the marriage contract. AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) § 34. Yet the defrauded party must repudiate the marriage as soon as the fraud is discovered or be deemed to have waived the fraud and then, as in the case of duress, be estopped to repudiate it. McIntosh v. McIntosh, 151 Miss. 78, 117 So. 352 (1928). These marriages being merely voidable, they must be attacked during the lifetime of the parties. White v. Williams, 159 Miss. 732, 739, 740, 132 So. 573, 575 (1931).

[40]See AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) §§ 41-44.

[41]1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) § 228.

[42]*Ibid.*

rupted? It has been suggested that the judiciary has confused cohabitation as "evidence of consent" for "evidence of a marriage" and that which is necessary "to create a marriage" with that which is necessary to "prove a marriage."[43] And yet, although cohabitation is a required element to create a common law marriage in Mississippi, it would appear that such an error did not lead to the perversion of the maxim in this state.

(1) *Why Cohabitation Is a Necessary Element*

Cohabitation as an essential element of common law marriage had its birth in the constitutional provision of 1869.[44] The wording of this provision is not prospective. The words, "All persons who have not been married, *but are now living together, cohabiting as husband and wife"* would seem to indicate that only those persons *now living together,* at the time of the adoption of the constitution, were affected and not those persons who commenced cohabitation after the adoption of the constitution. Had this construction been adopted the purpose of the provision would have been more nearly attained and the common law marriage would not have been effected subsequently. The purpose obviously was to validate the cohabitation of the previous slaves, now emancipated, who had not had the legal capacity to marry but had been cohabiting as husband and wife.[45] It is true that the provision was interpreted to relate to all classes indiscriminately,[46] and rightly so, but it was intended to validate marriages where matrimonial cohabitation existed prior to and continued at the moment the constitution went into effect and was not an invitation to people to marry by merely commencing a cohabitation after the adoption of the constitution. The construction, however, was not limited as indicated but, instead, was applied prospectively as well as retrospectively. The result was that common law marriage could not be accomplished within the state without cohabitation following a present agreement of marriage.

The first case that was decided under this constitutional provision was the case of *Dickerson v. Brown.*[47] The maxim, *Consensus, non concubitus, facit matrimonium,* was stated with approval, but the court said:

> "In the view entertained of the questions involved, and the present attitude of this case, it is not material to review at any length, the adjudications on marriage, *per verba de praesenti . . . Their present consideration might be essential, but for the consti-*

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[43]Keogel, Common Law Marriage (1922) 127-131. See also following for distinguishing cohabitation as proof of marriage and not part of marriage: Notes (1932) 1 Brooklyn L. Rev. 79; (1932) 66 U. S. L. Rev. 164; (1937) 23 Iowa L. Rev. 75.

[44]Miss. Const. (1869) Art. 12, § 22. Italics added.

[45]Rundle v. Pegram, 49 Miss. 751, 755 (1874).

[46]Dickerson v. Brown, 49 Miss. 357, 374 (1873).

[47]49 Miss. 357 (1873).

> *tutional provision of our state.* . . . "The conclusion is, that if these parties were 'cohabiting as husband and wife,' at the time of the adoption of the present constitution, and if, with a knowledge of its provisions, they mutually assented to the relation, then their marriage was consummated and their children legitimated."[48]

Cohabitation, in other words, had become an essential part of the marriage itself.

Several cases were cited in this opinion which, it was said, had settled the question that common law marriages were valid in Mississippi "without formal or ceremonial solemnization."[49] That the law had been settled is unquestioned but a review of the cases cited reveals that none of them held cohabitation was an essential part of common law marriage, nor are there any other cases to be found so holding.

An examination of the eight cases cited by the court reveals that only three can be said to have any relevancy to the common law marriage.[50] In *Stevenson's Heirs v. McReary,*[51] the court in reviewing the instructions of the lower court had this to say about the accuracy of the instruction relating to a marriage:

> *"Cohabitation, and holding out to the public as man and wife, furnished but presumptive evidence of marriage.* The charge was too strong; it left no room for the jury to determine on the weight of the evidence. The weight of the evidence may have been against the actual marriage, but by giving the charge the court would have cut out all rebutting proof, by directing the jury that under proof of cohabitation, etc., they must find for the plaintiffs notwithstanding the proof that no marriage was solemnized."[52]

It should be noted that in this early case much was made of the fact that no proof was available that a marriage was solemnized which would seem to indicate that, at this time at least, there must have been some doubt that a common law marrige was valid within the state. The fact of importance, it would seem, was that the court did state that cohabitation *"furnished but presumptive evidence of a marriage"* rather than part of the marriage itself.

Another case which was cited was that of *Hargroves v. Thompson,*[53] which held that the marriage statute was merely directory and, in the absence of specific or express words to the contrary, common law mar-

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[48]Dickerson v. Brown, 49 Miss. 357, 376 (1873).

[49]*Id.* at 375.

[50]The five cases cited by the court which had no bearing on the common law marriage are as follows: Powell v. Powell, 27 Miss. 783 (1854); Spears v. Barton, 31 Miss. 547 (1856); Detterly v. Yeamans, 39 Miss. 475 (1860); Bates v. Stokes, 40 Miss. 56 (1866); Carson v. Carson, 40 Miss. 349 (1874).

[51]20 Miss. 2 (1849).

[52]*Id.* at 57. Italics mine.

[53]31 Miss. 211 (1856).

riages are valid. Other than to interpret the marriage statute and to determine directly that common law marriages were valid under the statute, this case had little value as a good discussion on the law of common law marriage.

The only other case cited by the court which had any relevancy was the case of *Henderson v. Cargill.*[54] This decision was rendered in the same year and but a short time after the decision in the *Hargroves* case. Here it was said that "Proof that a man and woman cohabited as husband and wife, *is evidence from which a court might infer the existence of a marriage between them.*"[55] Cohabitation was proof of the *existence of a marriage* and *not part of the marriage.*

We must conclude, therefore, that prior to the Constitution of 1869 cohabitation was not an essential part of a common law marriage because none of the previous cases so hold and even *Dickerson v. Brown* assumed that this was the situation. *Dickerson v. Brown* is a milestone which marked the beginning of the present day rule that a present agreement must be followed by cohabitation for a valid common law marriage in Mississippi.

Several other cases followed *Dickerson v. Brown* in quick succession, which, besides limiting and more clearly defining cohabitation, firmly entrenched the new rule requiring cohabitation.[56] In the first of these cases[57] it was found that cohabitation must be in matrimonial intent and not meretricious in character. In 1876 when the Supreme Court reviewed the instructions of the lower court in *Taylor v. State,*[58] one of which was to the effect that a marriage was good without ceremony and by the mere consent of the parties, the instruction was held deficient in not having added that "such consent and intent must be followed up by actual cohabitation thereunder as man and wife."[59]

And so the rule became firmly established via a constitutional provision until it matured into the present phraseology used by Chief Justice Smith in the *Sims* case, where it was said that a common law marriage is "an agreement between a man and woman to then and there become husband and wife followed by cohabitation."[60]

But, even admitting that the constitutional provision of 1869 was prospective as well as retrospective, should this necessarily mean that

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[54]31 Miss. 367 (1856).
[55]*Id.* at 419. Italics added.
[56]Rundle v. Pegram, 29 Miss. 751 (1874); Taylor v. State, 52 Miss. 84 (1876); Floyd v. Calvert, 53 Miss. 37 (1876); Kinard v. State, 57 Miss. 132 (1879); Adams v. Adams, 57 Miss. 267 (1879); Blanks v. Southern Ry., 82 Miss. 703, 35 So. 570 (1903); Howard v. Kelly, 111 Miss. 285, 71 So. 391 (1916).
[57]Rundle v. Pegram, 49 Miss. 751 (1874).
[58]52 Miss. 84 (1876).
[59]*Id.* at 87 (1876).
[60]Sims v. Sims, 122 Miss. 745, 755, 85 So. 73, 74 (1920).

such a corruption of the common law rule need have continued after that law had ceased to be effective? This constitutional provision ceased to be effective when the constitution of 1890 was adopted, for it was absent from the new document. The Code of 1892[61] then made any common law marriage invalid until the curative appendix was added in the Code of 1906 which stated that the section should not be construed to invalidate any marriage good at common law.[62] What common law? The Supreme Court raised the same question when it considered the problem in the *Sims*[63] case and then proceeded to answer it by saying the common law of Mississippi was meant. But what was the common law of Mississippi? Was the common law of Mississippi the same as it had been prior to the constitution of 1869, or, was the common law of Mississippi the common law as it had existed but in addition thereto perverted by a constitutional provision which was no longer effective? It would appear, aside from policy,[64] that the more reasonable conclusion would be the former; that is, that the common law reverted to what it had been before the provision of the Constitution of 1869 had perverted the rule.

Yet the Supreme Court in the *Sims* case assumed, without giving any reason therefore, that the present agreement must be followed by cohabitation. The court explained the apparent conflict of the provisions of section 3249, Code of 1906, by saying that there are two methods to marry under the Code: the ceremonial marriage, and that prescribed by the common law, "which is an agreement between a man and woman to then and there become husband and wife *followed by cohabitation.*"[65] That two methods are provided for by the code in this section appears correct; but no provision is made that cohabitation must follow a present agreement in order to effect a common law marriage. At this time, it is repeated, there was no constitutional provision such as that which was found in the Constitution of 1869 requiring cohabitation, and the common law was the same as it had been prior to 1869.

Later, when the curative section of the marriage statute was brought forward in the Code of 1930, it read as follows:

> "The failure to comply with the provisions of this section shall not affect the validity of any marriage *duly solemnized, followed*

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[61]Miss. Code Ann. (1892) § 2864.

[62]Miss Code (1906) § 3249; Miss. Code Ann. (Hemingway, 1917) § 2556.

[63]122 Miss. 745, 754-55, 85 So. 73, 74 (1920).

[64]For a convincing argument that statutes should be passed in all states recognizing common law marriages requiring cohabitation or public assumption of marital relation of any marriage not contracted in conformity with statutes of the state, see Brickell, *Common Law Marriage* (1910) 44 Am. L. Rev. 256. *Cf.* Black, *Common Law Marriage* (1928) 2 U. of Cin. L. Rev. 113.

[65]Sims v. Sims, 122 Miss. 745, 754-55, 85 So. 73, 74 (1920). Italics added.

by cohabitation, nor the validity of common law marriages as heretofore recognized in this state."[66]

In *Sykes v. Sykes*[67] it was said that the interpretation placed by the court in the *Sims* case upon the pertinent section of the Code of 1906 received legislative sanction in the new wording of the Code of 1930. Without contradicting the court in its statement that there is no substantial difference in the language in the applicable sections of the Code of 1906 and the Code of 1930, the following would appear to be a reasonable and practical construction of section 2363, Code of 1930: A valid ceremonial marriage consists of one where the marriage has been solemnized upon a license duly issued. However, where the ceremonial marriage is faulty due to some defect in the issuance of the license or some technical fault is discovered, in the absence of a real impediment, if it is followed by cohabitation, it is thereby ratified by the parties and the defect cured. The second type of marriage provided for by this section, is the common law marriage which should be a simple present agreement without, necessarily, being followed by cohabitation. This interpretation is borne out by the wording of the curative section of the statute, for it says, "The failure . . . shall not affect the validity of any marriage *duly solemnized, followed by cohabitation,* nor the validity of common law marriages as heretofore recognized in this state." The words, *"followed by cohabitation,"* relate to the preceding clause and would seek to cure a defective ceremonial marriage. These words are not restrictive of the following clause, "nor the validity of common law marriages as heretofore recognized in this state." Nor is there anything within this last clause itself which would require cohabitation to follow a present agreement at common law. It would only seek to recognize the common law marriage in Mississippi. A slight doubt might arise in the words "as heretofore recognized in this state" if it were not for the fact that we do know that cohabitation was a requirement only by way of a constitutional provision that is now ineffective.

Recognizing, however, the accomplished fact that cohabitation must now be taken as an essential part of common law marriage, is there a difference between the curative section of the marriage statute embodied in the Code of 1906 and that embodied in the Code of 1930? The difference must be obvious. Under the pertinent section of the Code of 1906 a faulty ceremonial marriage followed by cohabitation would have resulted in a *common law marriage* while, under the Code of 1930 a faulty ceremonial marriage followed by cohabitation should result in a valid *ceremonial marriage.* Section 3249, Code of 1906, makes no provision for the ratification of a faulty ceremonial marriage and would thus have resulted in a common law marriage, if anything.

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[66]Miss. Code Ann. (1930) § 2363. Italics added.
[67]162 Miss. 487, 493, 139 So. 853, 854 (1932).

Although the Supreme Court has not expressly held that such a difference actually exists in the two curative sections of the two codes, it does seem to have given effect in the case of *Hunt v. Hunt,*[68] to the interpretation that a faulty ceremonial marriage under section 2363, Code of 1930, when followed by cohabitation, will result in a valid ceremonial marriage. Here the parties to the ceremonial marriage were under the statutory age of marriage but cohabited following the issuance of the license. The court said, "This marriage is valid under the statute without reference to what its validity *vel non* may be at common law."[69] And when the Supreme Court considered the *Hunt* case in *Zeigler v. Zeigler,*[70] where the parties were of statutory age but the license was not issued to the parties themselves by the clerk nor did the parties ever cohabit together, the court said:

> *"Hunt v. Hunt* is not at all decisive of this question. That was exactly the kind of marriage the statute was intended to provide against. In that case the female was only thirteen years and ten months of age, while the male was only nineteen. The marriage was upheld, but only on the ground that cohabitation followed."[71]

If, therefore, the situation in the *Hunt* case was *"exactly the kind of marriage the statute intended to provide against,"* then the fact that the court in *Hunt v. Hunt* called the marriage a valid statutory marriage merely because cohabitation had followed would support the argument that the interpretation placed upon this section of the Code of 1930 is correct. Moreover, when the court in the *Hunt*[72] case said the intention of the parties was irrelevant and that the only thing of importance was that cohabitation followed the faulty ceremonial marriage, it proved beyond a doubt that the marriage was a valid ceremonial marriage by ratification. It also proved beyond a doubt that it could not be a common law marriage because a common law marriage requires a cohabitation with matrimonial intent. Therefore, it must be concluded that *"followed by cohabitation"* in section 2363 of the Code of 1930 does not mean the same thing as *"followed by cohabitation"* connotes in the present common law rule. The former requires *merely a living together* to ratify the faulty marriage. The latter requires a *cohabitation with matrimonial intent.*[73]

A common law marriage carries with it a certain connotation which the average person shuns. This being true, why stigmatize two unfor-

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[68]172 Miss. 732, 161 So. 119 (1935).
[69]*Id.* at 743, 161 So. 122 (1935).
[70]174 Miss. 302, 164 So. 768 (1935).
[71]*Id.* at 311, 164 So. 771.
[72]172 Miss. 732, 743, 161 So. 119, 122 (1935).
[73]For a definition of cohabitation and a discussion of the necessary elements of cohabitation within the meaning of MISS. CODE ANN. (1930) § 2363 not wholly consistent with this writer's views, see Note (1936) 8 MISS. L. J. 312.

tunate persons because of a small defect which crept into their marriage? The parties attempted the ceremonial marriage because they wanted to avoid the less formal and less orthodox method. It is advantageous to the state and the community to encourage the formal way and discourage the less orderly route. If, naturally, the parties were wholly incapable of accomplishing a ceremonial marriage because of the existence of such an impediment as to make it impossible, then to find a common law marriage would be a last resort, for there would be no other alternative..

(2) *Cohabitation Defined*

Taking the law as it is found and admitting the reality of cohabitation as a necessary element of the common law marriage, what is cohabitation? *Webster's New International Dictionary* defines the term as the act or state of dwelling or living together as man and wife. *Black's Law Dictionary* defines the word more accurately for our purpose as the living together as husband and wife but there must be something more than mere meretricious intercourse. The Supreme Court never really attempted to define the term until 1935 in the case of *Hunt v. Hunt,*[74] although the court had in previous decisions distinguished between a lawful and meretricious relationship. "The word 'cohabitation,'" the court said, "as used in the marriage laws means the public assumption by a man and woman of the marital relation, and dwelling together as such, thereby holding themselves out to the public as being man and wife." The definition is complete but for the qualification that the marital relation must be a "lawful marital relationship" as opposed to the illicit or meretricious relationship. If it is not qualified in this manner, previous married persons, for instance, would fit the definition as well as persons who are not incapacitated to marry under the common law.

(2) *Must Cohabitation Follow* eo instante?

Consider the present common law marriage rule. It is an agreement between a man and woman then and there to become husband and wife followed by cohabitation. Must cohabitation follow immediately the faulty ceremonial marriage or the present agreement? Must it be acted upon *eo instante?* In reference to an interval of time elapsing between a faulty ceremonial marriage and the cohabitation that followed, the court in the *Hunt* case had this to say:

> "It may be that circumstances may intervene between an irregular marriage ceremony and cohabitation between the parties thereto of such character as to prevent the cohabitation validating the marriage (i.e., a valid marriage by one of the parties subsequent to a ceremonial marriage to another, and before cohabitation by them), as to which we express no opinion. It is true that the cohabitation here did not immediately follow the marriage ceremony; but

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[74]172 Miss. 732, 743, 161 So. 119, 121 (1935).

> the period of time intervening is too short for any question to arise relative thereto, assuming for the purpose of argument, that the time between the ceremony and cohabitation, if of great length, could be held to prevent the cohabitation from validating the marriage."[75]

A like situation would arise where the parties were attempting a common law marriage and a period of time had elapsed between the making of the present agreement and the cohabitation which would necessarily have to follow.

The interim between the faulty ceremonial marriage and cohabitation which had followed in this case was approximately three weeks. The inference to be drawn is that the length of time intervening would have little effect unless some incapacity (such as a marriage in the meantime by one of the parties) had projected itself into the whole transaction (i.e., present agreement and cohabitation). It is reasoned from the fact that in the *Hunt* case the parties, after the faulty ceremonial marriage and a period of three weeks had elapsed, entered into an agreement to cohabit but to hold the marriage in abeyance, in effect, until the priest would sanction the marriage. The intentions of the parties, it will be seen, were plainly not matrimonial but inclined to be illicit. The court, nevertheless, in construing the provisions of the statute which validates "any marriage duly solemnized, followed by cohabitation"[76] found that the statute is automatic and that cohabitation following a marriage solemnized without compliance with the statute validates the marriage, a contrary intention of the cohabitants notwithstanding.[77] It would follow that, if the intentions of the parties are irrelevant, where the parties in good faith acted upon the faulty ceremonial marriage, even after the interval of a year, the marriage would be good for this would suffice to ratify the marriage. But, where there is a present agreement, the intentions of the parties would, of course, be of the greatest importance. Yet, once a present agreement is entered into in good faith, the interval of time elapsing between the making of the agreement and cohabitation that followed would not alter the validity of the common law marriage.

(4) *Cohabitation and Coition*

Coition is not an integral part of cohabitation.[78] The parties in the *Hunt* case cohabited pursuant to an agreement to refrain from any act of coition until their marriage was sanctioned by the church. Both parties stated that during their three weeks of cohabitation they abided by the agreement and refrained from intercourse. The court, assuming that this was the true state of the facts, held that coition was not necessary to

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[75]*Id.* at 742, 161 So. at 121.
[76]Miss. Code Ann. (1930) § 2363.
[77]Hunt v. Hunt, 172 Miss. 732, 743, 161 So. 119, 122 (1935).
[78]*Id.* at 742, 161 So. 121 (1935).

constitute cohabitation. It was added that the previous decisions had implied but not expressly held that cohabitation may be without coition, and that this view had the support and approval of the highest courts and jurists of authority.[79]

But, while coition is not indispensable to achieve matrimonial cohabitation where the capacities of the parties are otherwise fruitful, there is reason to believe that coition, of itself, might in the proper case meet the requirement of cohabitation.[80] Perhaps this is best shown by illustration. A man and woman have decided to marry. The parties use either the formal route and have attained a faulty ceremonial marriage or have entered into a present agreement to marry at common law. Before cohabitation can follow the man dies or is inducted immediately into the army and is lost in action. The woman is pregnant by him and has a child. The parties did everything in their power to consummate the marriage and attain the lawful status. Is the child illegitimate? Are the woman and child lawful heirs and entitled to the man's war insurance? These problems are not remote in view of the present world conflict. Judge Anderson indicates the possible solution in his opinion in *Zeigler v. Zeigler*.[81] The appellant in the case had been arrested and jailed for having violated the "age of consent statute."[82] Appellee's father had misrepresented her age and the appellant, being told that his prosecution would be pushed, married appellee, after appellee's father and appellant's brother-in-law had obtained a license. The appellant immediately deserted appellee and never did cohabit with her. After finding that the misrepresentation here by the father did not amount to duress sufficient to avoid the marriage the court held that a technical construction of the marriage statutes[83] would not be adopted by the court but that the desire of the court was to reach the real intention of the legislature.

This would seem to establish the attitude of the court toward a faulty ceremonial marriage where coition follows but intervening circumstances make cohabitation in the sense of living together impossible. Coition would then constitute cohabitation.

V. *Removal of Impediments*

An important phase of the subject is that which has to do with impediments or obstacles to the validity of the marriage at the time the parties attempted to contract toward the status. Such an impediment[84]

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[79] *Ibid.*
[80] *See contra,* Note, (1936) 8 Miss. L. J. 312.
[81] 174 Miss. 302, 164 So. 768 (1935).
[82] Miss. Code Ann. (1930) § 1123.
[83] Miss. Code Ann. (1930) §§ 2363, 2367.
[84] The term "impediment" is not used in the same sense as incapacity but is being applied in the sense that all other essentials are present to effect a valid marriage but

might be a prior existing marriage by one of the parties. This is just one of the many obstacles which could create an impediment to a valid common law marriage. If the impediment continues to exist, there is no doubt that the marriage is ineffective and the legal status not attained. When, however, the impediment is removed, we have a real problem in determining whether, in the light of all the surrounding circumstances, the matrimonial status has been accomplished. Even then the problem can be narrowed. A new agreement between the parties after the removal of the impediment, without regard to prior circumstances, will make them man and wife.[85] We need, therefore, only concern ourselves with the situation where no new agreement is expressly made after the removal of the obstruction.

(1) Where One or Both of the Parties Are Innocent

First consideration must be given to those instances where either one, or both, of the parties was unaware of the existence of any impediment at the time they attempted to marry. If both parties attempted to marry in good faith, as, for instance, when they believed that the former spouse was dead, and they continued to cohabit as husband and wife after the removal of the impediment, the weight of authority gives to their continuing intention the legal effect of a new agreement.[86] Mississippi follows this rule in *Sims v. Sims*.[87]

The question is somewhat clouded where only one of the parties is innocent and unaware of the existing obstruction.[88] Nevertheless, there is strong indication to permit the belief that the court will presume a new agreement in the continued cohabitation of the parties as man and wife in the same manner as employed when both parties are innocent.[89]

(2) Where There Is Knowledge of Impediment

Is a new agreement necessary after the impediment is removed, the existence of which was within the knowledge of both parties at the time of the attempted marriage? The minority rule holds that no new agreement is necessary on the theory that their meretricious cohabitation changed to a lawful one after it became legally possible for them to marry. The majority rule, on the other hand, requires a new agreement on the theory that the relationship having commenced illicitly is presumed to continue until proof is sufficient to rebut the presumption.[90]

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the parties are incapable of any marriage at all at the time such a marriage was attempted. It is also applied to those circumstances where the parties have entered into a ceremonial marriage which was ineffective because the formalities of the ceremony did not meet the requirements of the marriage statutes.

[85]MADDEN, DOMESTIC RELATIONS (1931) 73.

[86]Ibid.

[87]122 Miss. 745, 85 So. 73 (1920).

[88]MADDEN, DOMESTIC RELATIONS (1931) 74.

[89]Crawford v. State, 73 Miss. 172, 18 So. 848 (1895).

[90]MADDEN, DOMESTIC RELATIONS (1931) 74, 75.

At first glance the Mississippi decisions appear to be in as great a conflict as exists among the courts of the various states; that is, both rules appear to be used indiscriminately, as suggested by Chief Justice Smith in *Sims v. Sims*.[91] A close scrutiny of the cases, however, discloses that, in effect, Mississippi has adopted the second, or majority rule, with qualification. The applicable rule appears to be as follows: Where two parties have attempted to marry with a knowledge of the existence of an impediment, it is presumed that the illicit relationship continued after the removal of the obstacle unless a new agreement is proved, but a new agreement may be implied from the acts and intentions of the parties.

Rundle v. Pegram,[92] an early case, held that there was no common law marriage between the parties after the removal of the impediment because "their conduct, relations, and deportment toward each other, continued as before." There was no evidence to show that the parties had desired the matrimonial status before the cohabitation commenced nor was there proof to show that the parties desired and intended to be husband and wife after the impediment had been removed. Of the same character was *Floyd v. Calvert*,[93] where the parties desired a meretricious relationship in the beginning and, although they had continued to live together for several years, they had never publicly acknowledged each other as husband and wife. Furthermore, it was not shown that this intention had changed by any other acts of the parties. In *Kinard v. State*,[94] Kinard had commenced an illicit relationship with a colored woman in 1868. At this time a marriage between a white man and a colored woman was prohibited but, when the Constitution of 1869[95] was adopted, this incapacity was removed. Upon conviction for unlawful cohabitation, Kinard defended on the ground that the impediment being removed by the adoption of the constitution, the parties had become man and wife. The court held that parties living together in open concubinage at the date of the ratification of the constitution would not validate a marriage between them. There was no evidence to indicate a change of intention or desire by the parties to cohabit as husband and wife either before or after the adoption of the constitution.

On the other hand, in *Dickerson v. Brown*,[96] the court found that there might be a common law marriage. When the cohabitation began,

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[91] 122 Miss. 745, 756-57, 85 So. 73, 75 (1920). The court here merely notes an apparent difference in the holdings of the case of Howard v. Kelly, 111 Miss. 285, 71 So. 391, Am. Cas. 1918 E. 1230 (1916); and the case of Thompson v. Clay, 120 Miss. 190, 82 So. 1 (1920).

[92] 49 Miss. 751, 757 (1874).

[93] 53 Miss. 132 (1879).

[94] 57 Miss. 132 (1879). *See also* Thomas v. Clay, 120 Miss. 190, 82 So. 1 (1920); Blanks v. Southern Ry., 82 Miss. 703, 35 So. 570 (1903).

[95] Miss. Const. (1869) Art. 12, § 22.

[96] 49 Miss. 357 (1873).

it was illicit because marriage between a white man and a colored woman was prohibited by law. The ratification of the Constitution of 1869 with its marriage provision, however, removed this disability. The question, it was said, becomes one of fact to be determined accordingly. The test was whether the parties had cohabited as husband and wife at the time the constitution was adopted and whether they mutually assented to the relation. No mention is made here of the need of an express agreement after the obstruction was removed.

The cohabitation was likewise meretricious in the beginning in *Adams v. Adams,*[97] because the deceased's wife was living. It was pointed out that the case was essentially different from the cases of *Rundle v. Pegram* and *Floyd v. Calvert* without finding it necessary to explain that the difference was the intentions and acts of the parties. In neither of these cases was there any evidence that the parties ever did desire matrimonial cohabitation. In *Adams v. Adams,* on the contrary, the intention of the parties was a desire to effect the matrimonial status which was only prevented by the life of decedent's wife. It was said that a new agreement was not necessary where the parties had done everything else possible to effect the status. A more recent case, *Sykes v. Sykes,*[98] presents another instance where a valid common law marriage was found without any new agreement by the parties.

These cases support the rule previously declared to have been evolved in the decisions of the court. If the parties have done everything possible to attain the status and really desire and would have attained the status except for the existence of an impediment; then, although the cohabitation was necessarily illicit in the beginning, the continued cohabitation of the parties as husband and wife implies a new agreement the moment the incapacity is removed. So, too, where the cohabitation was clearly with a desire to have intercourse illicitly, a changing desire and intent either before or after the removal of the existing impediment will amount to, or imply, a new agreement. But, where no desire or intention is manifested to reach a matrimonial status, the removal of the obstruction has no effect whatever upon the meretricious cohabitation. The question, then, as stated by the court in *Dickerson v. Brown*[99] is one of fact and proof.

(3) Removal of Impediment by Change of Residence

Where two people have attempted to marry in another state which does not recognize a common law marriage, either by common law or by a faulty ceremonial marriage, the removal of the parties to the State of Mississippi will validate the marriage at common law without a new

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[97]57 Miss. 267 (1879).
[98]162 Miss. 487, 139 So. 853 (1932).
[99]49 Miss. 357, 376 (1873).

agreement.[100] *Sims v. Sims*[101] illustrates the point. The parties attempted a ceremonial marriage in Indiana while Mrs. Sims had a husband living and undivorced. Later Mrs. Sims obtained a divorce. She and Mr. Sims continued to live together for a number of years, a greater part of the time in this state. The court without inquiring into the possibility of the marriage being validated in one of the other states where the parties cohabitated previous to their moving into Mississippi, found a valid common law marriage under the law of Mississippi by their continued cohabitation as husband and wife.

This rule which validates a common law marriage when the parties move from a foreign state to Mississippi has also the converse application. Due to the fact that common law marriages were not recognized in the State of Mississippi during the period from 1892[102] to 1906,[103] if all the conditions had existed between the parties to an agreement in this state during this period, the removal of the parties to another state, where such marriages were recognized, had the effect of removing the impediment.[104]

(4) Removal of Impediments by Statute

An unusual situation was created by the Code of 1892 and the interim that followed during which common law marriages were prohibited within the state. If a matrimonial cohabitation following a present agreement to marry at common law started in 1903, definitely the relationship was illicit because common law marriages were not recognized at this time. Assume, however, that the parties continued to cohabit as husband and wife in the State of Mississippi until 1912 when one of the parties died. In view of the provision of the Code of 1906 which again validated the common law marriage in Mississippi, it should follow that the impediment being removed and the matrimonial cohabitation continuing, the marriage status would automatically attach to the relationship.

Yet such were the facts in *Olivari v. Clark*,[105] but the court held that no common law marriage existed between the parties. The appellant argued, in total disregard of the attitude of the court in previous decisions which did not expressly hold but intimated the mandatory character of the marriage section of the Code of 1892, that common

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[100]See comment on Sullivan v. Am. Bridge Co., 176 Atl. 24 (Pa. Super. 1935) in Note, (1935) 83 U. of Pa. L. Rev. 801, which indicates how situation is treated where parties enter into an agreement to marry at common law in state not recognizing such marriages and then move to state recognizing same and avoiding conflict of laws problem.

[101]122 Miss. 745, 85 So. 73 (1920); *see also* D'Antonio v. State, 187 Miss. 648, 191 So. 281 (1939).

[102]Miss. Code Ann. (1892) § 2864.

[103]Miss. Code (1906) 3249; Miss. Code Ann. (Hemingway 1917) § 2556.

[104]Walker v. Matthews, 191 Miss. 489, 3 So. (2d) 820 (1941).

[105]175 Miss. 883, 168 So. 465 (1936).

law marriages were valid in Mississippi during this period and that no legal impediments existed to the validity of the marriage. But the court said, ". . . any attempted marriage between 1892, and 1906 was necessarily void."[106] It is odd that the court makes no mention of the character of the relationship after 1906 when common law marriages were valid in Mississippi! Perhaps had the court been asked to determine the real problem in the case, whether the curative part of section 3249 of the Code of 1906 had removed the impediment to the validity of a common law marriage between the parties, a different result might have been obtained.

If a precedent is needed, we need only consider the situation that arose after the adoption of the Constitution of 1869 with its provision that all persons living together as husband and wife should be taken in law as married. By the interpretation the court placed upon this provision an artificial impediment was often found to exist and, if the cohabitation of the parties was said to be matrimonial in intent, then the parties were assumed to have accepted the opportunity offered by the constitution and accomplished a valid common law marriage. And this technique was used in spite of the fact that the same situation existing between two white persons before the adoption of this constitution would undoubtedly have resulted in the matrimonial status just as well. So that, as far as two white persons were concerned, there never was an impediment to their marrying at all and the constitution did not remove an impediment but, instead, resulted in the added need for cohabitation to be present to effect a valid common law marriage between them. The court, however, treated this situation similarly to the removal of an impediment.

On the other hand, in the situation resulting from the adoption of the Code of 1892 prohibiting common law marriages and the Code of 1906 which again reestablished their validity in this state, there exists the real conditions for the removal of an impediment and validating a common law marriage.

Finally, it is illogical to hold that a marriage which in its inception was bigamous can be validated in certain instances by the death of the previous spouse but that an honest attempt to marry via common law, thwarted only by a statutory prohibition existing for a short period of time and which is later repealed, will not result in a valid common law marriage.

VI. *Proof of Marriage*

It matters not what elements are present to constitute a common law marriage between two individuals, unless such a status can be established

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[106] *Id.* at 896, 168 So. at 468.

in law should the necessity arise. Proof of marriage, therefore, is of the utmost importance and overshadows all other parts of this subject.

(1) Presumption of Marriage

When two people live together, the law presumes that they are husband and wife and that the legal status exists between them. This presumption is engrafted on all our law and flows from the basic principle of our jurisprudence that persons shall not be deemed without proof to be guilty of immorality in the like manner as it is presumed that all persons are innocent of crimes until it is proved otherwise.[107] This principle as applicable to marriage is embodied in the maxim, *Semper praesumitur pro matrimonio,*[108] which is used frequently and with great favor by the courts.

The presumption of a valid ceremonial marriage prevails everywhere, even in those states where the common law marriage is not recognized.[109] If it should fail, then the presumption will arise that the marriage was a valid common law marriage where the parties have cohabited. When no license was shown to have been issued and the witnesses could not say whether the preacher had a license at the time of the ceremony, the court said in *Walker v. Matthews*[110] that the "public evidence of their intention to assume the status of man and wife" was sufficient to establish a common law marriage. The statement of the court in *Howard v. Kelly*[111] that every presumption should be indulged in in favor of a common law marriage in the same way and to the same extent as the law will indulge in with reference to a ceremonial marriage, therefore, must only be qualified by adding that, when there arises the presumption of marriage, it is first presumed that the marriage was a ceremonial one.

But the presumption in favor of marriage may be overcome by rebutting evidence brought forward by an attacking party. For instance, one of the parties may have a living spouse. With no evidence to the contrary, the court will presume in favor of the innocence of the party. The result would be this: The presumption is that the marriage is a valid one and that a valid divorce had been obtained.[112] But, where it is shown by evidence that no divorce had been obtained by the previously married parties in the places of any of their residences which makes

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[107]1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) § 435.

[108]There is always a presumption in favor of the validity of a marriage. Howard v. Kelly, 111 Miss. 285, 71 So. 391 (1916).

[109]KEOGEL, COMMON LAW MARRIAGE (1922) 151; Wheelon, *The Evidential Force of Habit and Repute as Opposed to the Substantive Law Concerning Marriage* (1926) 1 WASH. L. REV. 277, where it is shown that the State of Washington does not recognize common law marriages but habit and repute in the proper circumstances will raise the presumption of a valid ceremonial marriage.

[110]191 Miss. 489, 509, 3 So. (2d) 820, 825 (1941).

[111]111 Miss. 285, 289, 71 So. 391, 392 (1916).

[112]*See* Bourland v. Hatchcock, 186 Miss. 223, 188 So. 9 (1939).

it reasonably certain that a divorce had not been obtained at any place other than one of the residences of the parties, will be sufficient to rebut the validity of the second marriage.[113]

This is only one of the situations where rebutting evidence will overcome the presumption of a valid existing marriage between the parties. The presumption, without any contradicting evidence, is sufficient to establish the legal status. The burden is then shifted to the attacking party. Where the attacking party comes forward with evidence contradicting a valid marriage, the burden is then shifted to those who are attempting to support and establish a common law marriage.[114]

(2) What Constitutes "Proof of Marriage"

The rule is that in order to effect a valid common law marriage *the parties must agree then and there to become husband and wife followed by cohabitation.*[115] This means a *present agreement followed by cohabitation.* If the rule is literally true, then it would be necessary to prove both an agreement between the parties in the present tense and a matrimonial cohabitation which must follow. Is this actually necessary in practice? The only necessary proof is that a matrimonial cohabitation existed between the parties which is proved by the *intentions of the parties as manifested by their public acts.*[116] We are aware of a complete change that has occurred in the common law marriage in Mississippi since its first recognition. First it was only necessary that there be a present agreement to marry between the parties. Then it became necessary to follow the present agreement with a matrimonial cohabitation. Now we shall find that in actual practice the only thing necessary in proof is that there was a matrimonial cohabitation at some time between the parties and they were in all other ways capable of marrying. We must not, however, forget the fact that the court continues to pay "lip-service" to the rule, present agreement followed by cohabitation.

More fully to appreciate the present state of the subject we may first consider what the court has said in connection with the mutual agreement and then review a few of the decisions which will indicate that the present agreement is not one which actually exists in fact but a conclusion in law. No particular words are necessary,[117] but the agreement must be attained via a mutual consent which is actual and *bona fide.*[118] Therefore,

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[113]Colored Knights of Pythias v. Tucker, 92 Miss. 501, 46 So. 51 (1908); Sullivan v. Grand Lodge, K.P., of Mississippi, 97 Miss. 218, 52 So. 360 (1910); Bourland v. Hatchcock, 186 Miss. 223, 188 So. 9 (1939); *Cf.* Harper v. Fears, 168 Miss. 505, 151 So. 745 (1934); Note, (1934) 6 Miss. L. J. 443.

[114]Sykes v. Sykes, 162 Miss. 487, 493, 139 So. 853, 854 (1932).

[115]Sims v. Sims, 122 Miss. 745, 755, 85 So. 73, 74 (1920).

[116]Rundle v. Pegram, 49 Miss. 751, 757 (1874).

[117]Dickerson v. Brown, 49 Miss. 357, 370 (1873).

[118]Smith v. Smith, 47 Miss. 211 (1872).

any language, the court has said, that is mutually understood or in any mode declaratory of the intentions of the parties is sufficient.[119] This consent may be either written or verbal.[120]

In one of the earliest cases, *Henderson v. Cargill,*[121] the court said that "the fact of marriage may be established by evidence of the acts and declarations of the parties, by proof of the general repute in the family, and by proof of the declarations of the deceased persons, who were related to them by blood." In *Rundle v. Pegram,*[122] the objection to the existence of a common law marriage was not only that a present agreement had not been shown but that neither of them had "held the other out to society and the world, as bearing toward each other the marital relation."[123] And in *Howard v. Kelly,*[124] where the cohabitation had commenced meretriciously, although no new agreement was actually proved, the fact that the parties assumed a marital relationship publicly was said to be sufficient. The court concluded that the unlawful character of the cohabitation was shown by the evidence in the case to have been changed from an unlawful to a lawful one "by the public announcement of the parties that they were man and wife and the assumption of all the burdens incident to matrimony."[125]

In the case of *Jourdan v. Jourdan,*[126] where the parties cohabited after the pregnancy of Mrs. Jourdan, and by holding themselves out as husband and wife the court found this sufficient to establish a common law marriage between them. *D'Antonio v. State*[127] presented the problem of a faulty ceremonial marriage within another state and the removal of the parties to this state. Here the fact that the parties "for several months lived and cohabited together as man and wife and openly proclaimed that relationship" was enough to constitute a valid common law marriage. And, although there was no proof that the parties were ever married ceremonially or that they were ever married by any method anywhere, this did not restrain the court from finding a valid common law marriage because he "told people around there that she was his wife" in the case of *Walker v. Matthews.*[128]

There are few cases where there was a real existing contract between the parties at the time cohabitation commenced, either written or verbal,

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[119]1 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) 229, quoted with approval in Dickerson v. Brown, 49 Miss. 357, 370 (1873).
[120]*Ibid.*
[121]31 Miss. 367 (1856).
[122]49 Miss. 751 (1874).
[123]*Id.* at 754.
[124]111 Miss. 285, 71 So. 391 (1916).
[125]*Id.* at 292, 71 So. at 393.
[126]181 Miss. 176, 179 So. 268 (1937).
[127]187 Miss. 648, 191 So. 281 (1939).
[128]191 Miss. 489, 507, 3 So. (2d) 820, 824 (1941).

or such an existing contract was even sought to be proved.[129] Perhaps such a contract was sought to be proved in *Dickerson v. Brown,*[130] where the allegations were that the parties desired the matrimonial status and, when the constitutional provision of 1869 went into effect, they joyfully accepted the opportunity mutually to accept each other as husband and wife. But even this amounts to more of a conclusion that a contract existed rather than the allegation of a contract upon which the marriage was founded. And, strange as it would seem, the case of *Blanks v. Southern Railway Co.*[131] provides a situation where an actual agreement was sought to be proved and the parties had actually cohabited together for several years, yet no common law marriage was found because the parties commenced the cohabitation meretriciously while the woman's husband was still alive. Attention may again be called to the case of *Howard v. Kelly,*[132] with virtually the same existing facts, where a public assumption by the parties of the marital relationship, with no attempted proof of a real written or verbal agreement, was found to be sufficient to establish the status. *Olivari v. Clark*[133] is another instance where it was alleged that the parties cohabited after an agreement to live as man and wife. Here, however, an agreement was irrelevant because common law marriages were said to be invalid at the time the agreement was entered into.

Under the decisions the conclusion seems warranted that, although an averment of a present agreement followed by cohabitation is necessary and essential, in actual fact the only evidence required to establish the status is a matrimonial cohabitation by the parties which is manifested by their public acts. The public acts which would fulfill the requirement include a *holding out of each other* as husband and wife; *acting for each other* in the manner a husband would act for his wife and a wife would act for her husband; by *raising and caring for a family* in the same manner as husband and wife; and the acquiring of a *general reputation* in the community in which they live as being in fact husband and wife.[134]

That this procedure is also applicable to those situations where an impediment exists at the time the cohabitation commenced follows as a matter of course and is proved by the decisions. That is the real difference in the seeming conflict in the cases in question—the acts of the parties in public. Whether the desires and intentions of the parties are shown to be matrimonial in character either before or after the removal

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[129]Schilling v. Parsons, 36 N. E. (2d) 958 (Ind. 1941); Note, (1942) 11 FORDHAM L. REV. 90.

[130]49 Miss 357 (1873).

[131]82 Miss. 703, 35 So. 465 (1903).

[132]111 Miss. 285, 71 So. 391 (1916).

[133]175 Miss. 883, 168 So. 465 (1936).

[134]*But see* Note, (1929) 14 IOWA L. REV. 215, 216, where the logical argument is presented that the parties might actually be living together illicitly, and to cover up their meretricious relations, hold themselves out to the community to be husband and wife, until the community, having no reason to believe differently, treats them as such and never questions their apparent right to cohabit.

of the impediment would be immaterial in establishing the marriage. If this condition is shown to be present before the removal of the impediment, their continued matrimonial cohabitation would imply a new agreement from the moment the obstruction is removed. If, on the other hand, it is perceived first after the removal of the impediment, it would in theory take effect from the time it was perceived, with the restriction in practice that the court does not feel itself called upon to determine the day or month when it could be safely said the marriage existed.[135]

That a common law marriage may be established by cohabitation and repute of marriage is nothing new. Bishop says that "some of the authorities favor the idea, that reputation of itself may be received as sufficient proof prima facie, but it must be uniform and general"[136] and Kent states that "marriage may be inferred from the continual cohabitation, and reputation as husband and wife."[137] This is no attempt to deny the existence of the rule that there must be a present agreement followed by cohabitation, but the important thing is to advance sufficient evidence of the intent of the parties to cohabit matrimonially by their public acts and the agreement will be inferred or implied in law.

With the positive need for public reputation of marriage, it is obvious that the present state of the situation will not admit of a secret common law marriage, even in the face of a written agreement of present marriage between the parties. There are no cases on the point, but this is unnecessary to prove the point when we know that a valid common law marriage can only be effected by a matrimonial cohabitation that can only be proved by their reputation of being known as husband and wife.

Finally, once a matrimonial status is attained at common law, it cannot be avoided by either or both parties except in the same manner prescribed for a ceremonial marriage. For example, the parties cannot remarry without first having obtained a divorce or annulment decree.[138]

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[135]Howard v. Kelly, 111 Miss. 285, 71 So. 391 (1916).
[136]1 Bishop, Marriage and Divorce (4th ed. 1864) § 438.
[137]2 Kent, Commentaries (11th ed. 1867) § 87.
[138]Haines v. Haines, 90 Miss. 100, 43 So. 465 (1907); Jourdan v. Jourdan, 181 Miss. 176, 179 So. 268 (1938).

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